# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

## No. 253

DOROTHY SCOTT, PLAINTIFF IN ERROR,

vs.

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD BRACKETT, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

FILED JANUARY 21, 1925

(30,822)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 3, 1925

[fol. 1] **IN SUPREME COURT OF GEORGIA**

WRIT OF ERROR—Filed Dec. 26, 1924

UNITED STATES OF AMERICA, ss:

[Seal of the U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Dorothy Scott, plaintiff in error, and J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, defendants in error, wherein was drawn in question the validity of statutes of said State, on the ground of their being repugnant to the Con-[fol. 2] stitution of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Dorothy Scott as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

O. C. Fuller, Clerk United States District Court, Northern District of Georgia.

Allowed by Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

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[fol. 3] CITATION—In usual form, showing service on Walter McElreath et al.; filed Dec. 26, 1924; omitted in printing

[fol. 4] IN SUPREME COURT OF GEORGIA

No. 3892

DOROTHY SCOTT

vs.

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD BRACKETT, and JAMES I. LOWRY, Sheriff

PETITION—Filed Dec. 24, 1924

To the Honorable R. B. Russell, Chief Justice of the Supreme Court of Georgia:

The petition of Dorothy Scott, by her attorneys, Hooper Alexander and Paul Donehoo, hereby sets forth that on the 30th day of September, 1924, the Supreme Court of the State of Georgia entered a final order and judgment herein in favor of J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, against Dorothy Scott, in which final order and judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said Dorothy Scott, all of which will in more detail appear from the assignment of errors which is filed with this petition.

That the Supreme Court of the State of Georgia is the highest court of said State in which a judgment in this suit and in this matter could be had.

Wherefore: Your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of Georgia, for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

This 24th day of December, 1924.

Hooper Alexander, Paul Donehoo, Attorneys for Petitioner.

[File endorsement omitted.]

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[fol. 5] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRAYER FOR REVERSAL—Filed December 24, 1924

And now comes said plaintiff in error, and with her petition for writ of error, presents this her prayer for reversal of the judgment of the Supreme Court of Georgia, entered on the 30th day of Septem-

ber, 1924, affirming the judgment of the Superior Court of Fulton County, Georgia of June 8, 1923, dismissing the petition filed in said Superior Court on the 13th day of February, 1923, as amended on the 27th day of March, 1923, and on the 29th day of May, 1923, praying for the recovery of land and for other relief, wherein the said Dorothy Scott was plaintiff and the said J A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, were defendants, all of which matters are more fully set out in the petition for writ of error. And she further prays for reversal of the order of said Superior Court dismissing said petition.

Hooper Alexander, Attorney for Plaintiff in Error, 1216 Healey Building, Atlanta, Georgia. Paul Donehoo, Attorney for Plaintiff in Error, 312 Georgia Savings Bank Building, Atlanta, Georgia.

[File endorsement omitted.]

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[fol. 6] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 24, 1924

Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment in the above entitled matter, there is manifest error in this, to-wit:

First. The Court erred in holding that the provisions of an Act of General Assembly of Georgia approved August 27th, 1872, entitled "An act to amend an act entitled "An Act to provide for the sale of property in this state to secure Loans and other debts," as the same were enlarged and amplified by the provisions of the first section of an Act of the General Assembly of Georgia, approved December 17th, 1894, entitled "An Act to provide for the levy and sale of property where the defendant has an interest therein but does not hold the legal title"—which said provisions are embodied in and constitute Section 6037 of the Civil Code of Georgia of 1910—and said Code Section 6037 are not in conflict with and in violation of the Fourteenth Amendment of the Constitution of the United States, for that the State of Georgia through said provisions of said statutes, assumes and seeks:

(a) To deprive the plaintiff in error and other citizens of the United States of property without due process of law.

(b) To deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of eGorgia the equal protection of the laws.

Second. The Court erred in not holding that said provisions of said statutes and that said Code Section 6037 are in conflict with and in violation of the Fourteenth Amendment of the Constitution of the [fol. 7] United States in that the State of Georgia, through said provisions of said statutes, and through said Code Section assumes and seeks: (a) to deprive the plaintiff in error and other citizens of the United States of property without due process of law; (b) to deny to the plaintiff in error and other citizens of the United States, the equal protection of the laws.

3. The Court erred in holding that plaintiff in error is not, by said provisions of said statutes and by said Code Section, deprived of property without due process of law.

4. The Court erred in not holding that plaintiff in error is, by said provisions of said statutes and by said Code Section, deprived of property without due process of law.

5. The Court erred in holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code Section, was accorded due process of law.

6. The Court erred in not holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code Section, was not accorded due process of law.

7. The Court erred in holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was accorded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes and by said Code Section, was not to deprive plaintiff in error of her property without due process of law.

8. The Court erred in not holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was accorded no opportunity to defend [fol. 8] her rights in said property, as authorized by said provisions of said statutes and by said Code Section, was to deprive plaintiff in error of her property without due process of law.

9. The Court erred in holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code Section, was not to deprive plaintiff in error of property without due process of law.

10. The Court erred in not holding that to divest plaintiff in error of her property without any judicial proceeding to which she was a party, as authorized by said provisions of said statutes and by said Code Section, was to deprive plaintiff in error of property without due process of law.

11. The Court erred in holding that said provisions of said statutes and said Code Section do not deny to plaintiff in error the equal protection of the laws.

12. The Court erred in not holding that said provisions of said statutes and said Code Section do deny plaintiff in error the equal protection of the laws.

Hooper Alexander, Paul Donehoo, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

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[fol. 9] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 7, 1925

To the Clerk of said Court:

By agreement and stipulation among counsel for the parties to the above stated case, you are hereby requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to a Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following, and no other papers:

The original petition filed by plaintiff; the demurrer of J. A. Paisley, Mrs. Fannie Paisley and Claud Brackett to said petition; the amendment to plaintiff's petition filed March 27th, 1923; the amendment to plaintiff's petition filed May 29th, 1923; the judgment rendered on the demurrer of J. A. Paisley, Mrs. Fannie Paisley and Claud Brackett, by the Honorable George L. Bell, Judge of the Superior Court, Atlanta Circuit, dated June 8th, 1923; the bill of exceptions filed by plaintiff to said judgment; the judgment and opinion of the Supreme Court of Georgia in said case; plaintiff in error's petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Georgia, allowed December —, 1924; her prayer for reversal; her assignment of errors; the Writ of Error; the citation; and the bond given by plaintiff in error upon the issuance of said citation.

This 31st day of December, 1924.

Paul Donehoo, Attorney for Plaintiff in Error. McElreath & Scott, Attorneys for J. A. Paisley, Mrs. Fannie Paisley, and Claud Brackett. Napier, Wright & Wood, Attorneys for J. I. Lowry, Sheriff.

[File endorsement omitted.]

[fols. 10 & 11] Bond on Writ of Error for $500—Approved and filed Dec. 26, 1924; omitted in printing

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[fol. 12] In Supreme Court of Georgia

[Title omitted]

**Bill of Exceptions and Order Settling Same**—Filed in Superior Court July 10; in Supreme Court July 26, 1923

Be it remembered, in the case of Dorothy Scott vs. J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, the same being an equitable petition filed by the plaintiff against the defendants in the Superior Court of Fulton County, Georgia, that the defendants having interposed their general demurrer to plaintiff's petition, and plaintiff having twice amended her petition, and defendants having renewed their demurrer to said petition as amended.

The said demurrer came on for a hearing before the Honorable George L. Bell, Judge of said Court, on the 8th day of June, 1923, and after argument of counsel thereon, the Court entered an order sustaining said demurrer, and dismissing plaintiff's petition.

To the entering of said order sustaining said demurrer, plaintiff in error then and there excepted, now excepts, and assigns the same as error; and says that the same was contrary to law, that the said petition set forth a good cause of action against each and all of the defendants therein named, and that said demurrer should have been overruled.

Said order constituted a final determination of said cause in said Court, adverse to plaintiff in error.

Plaintiff in error specifies as material to a clear understanding of the errors complained of, the following portions of the record in said case:

(1) Plaintiff's original petition, omitting process and service.

[fol. 13] (2) The amendment to plaintiff's petition allowed on the — day of April, 1923, together with the order of Court, allowing same.

(3) The amendment to plaintiff's petition allowed on the 25th day of May, 1923, together with the order of Court allowing same.

(4) The demurrer of defendants to plaintiff's petition.

(5) The order of Court sustaining said demurrer.

And now comes plaintiff in error, within the time allowed by law, and presents this, her bill of exceptions, and prays that the same be certified by the Court as true, in order that the errors herein complained of may be reviewed and corrected.

Paul Donehoo, 312 Flat Iron Building, Atlanta Ga.; N. T. Anderson, Jr., 312 Flat Iron Building, Atlanta, Ga., Attorneys for Plaintiff in Error.

I do certify that the foregoing bill of exceptions is true, and specifies all the record material to a clear understanding of the errors complained of. And the Clerk of the Superior Court of Fulton County is hereby directed to make out a complete copy of such portions of the record as are in this bill of exceptions specified, and certify them as such, and cause them to be transmitted to the October Term, 1923, of the Supreme Court of Georgia, in order that the errors alleged to have been committed, may be considered and corrected.

This 28th day of June, 1923.

Geo. L. Bell, Judge S. C. A. C.

[fols. 14 & 15] Due and legal service of the above and foregoing bill of exceptions is hereby acknowledged, copy received. All other and further notice and service waived.

This 28th day of June, 1923.

McElreath & Scott, Silvey Building, Atlanta, Ga., Attorneys for Defendants in Error.

[File endorsement omitted.]

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[fol. 16] In Superior Court of Fulton County

Petition—Filed Feb. 13, 1923

The petition of Dorthy Scott respectfully shows to the Court the following facts:

1. That J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and and James I. Lowry, the defendants herein, are all residents of Fulton County, Ga., the said James I. Lowry being Sheriff of said County and being sued as such.

2. On the 9th day of January 1917, the said Mrs. Fannie Paisley owned all that tract or parcel of land lying and being in land lot 140 of the 14th District of Fulton County, Ga., more particularly described as beginning at a point on the east side of Atwood street in the City of Atlanta, one hundred and ninety nine and two tenths feet south of the southeast corner of Atwood street and Lucile Ave., said beginning point being on the south side of a fifteen foot alley which runs parallel with Lucile Ave., extending thence south along the east side of Atwood St., fifty feet; thence east, parallel with the alley aforesaid, one hundred and eighty five feet; thence north parallel with Atwood Street, fifty feet to the south side of said alley, thence west along the south side of said alley, one hundred and eighty five feet to the point of beginning.

3. On said date, the said Mrs. Fannie Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal, for

Five Hundred and Fifty Dollars, with interest at eight per cent. per annum payable semi-annually, which said note matured on the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal.

4. Subsequently on the 30th day of July, 1919, said Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, said convevance being made subject to the loan deed referred to in [fol. 17] the preceding paragraph.

5. On the second day of October 1919, said H. Calhoun Wilson conveyed said property by warranty deed to petitioner, subject to the loan aforesaid.

6. In purchasing said property, petitioner acted in perfect good faith, and without any notice of any defect which may have existed in the deed from the said Mrs. Paisley to the said H. Calhoun Wilson, and petitioner was, as to said property, a bona fide purchaser without notice of any existing claims between the said H. Calhoun Wilson and any other person.

7. Sometime prior to the return day of the May Term, 1920, of the City Court of Atlanta, said Miss Pauline Schoenthal, through her attorneys, notified the said Mrs. Fannie Paisley of her intention to bring suit, returnable to the May Term 1920, of the City Court of Altanta, on the note referred to in paragraph 3 of this petition, and to ask that the judgment rendered in said case include ten per cent. of principal and accrued interest as attorney's fees.

8. Said Miss Schoenthal did enter suit on said note, returnable to the May Term 1920, of the City Court of Atlanta, and said suit was served upon the said Mrs. Fannie Paisley, the defendant therein named.

9. On the second day of the said May Term, 1920, of said City Court of Atlanta, the said Mrs. Paisley having failed to interpose any defense to the said suit, the said case was entered in default.

10. Thereupon the said Miss Pauline Schoenthal on the 4th day of May, 1920 too- a verdict against said Mrs. Paisley, for principal, interest and attorney's fees due on said note, and finding in favor of a special lien on the property described in the loan deed mentioned in paragraph 3 of this petition.

11. On the same day, judgment was rendered in accordance with [fol. 18] said verdict, and execution issued on said judgment.

12. Thereafter, the said Miss Pauline Schoenthal executed to the said Paisley, as defendant in fi. fa., a quit claim deed to the said property, for the purpose of levy and sale, filed the same in the office of the Clerk of the Superior Court of said County, and had the same recorded.

13. Thereupon, defendant James I. Lowry, Sheriff levied the execution aforesaid upon the property whereon a special lien was

declared, and proceeded to advertise the same for sale on the first Tuesday in June 1920.

14. At the time and place designated in said advertisement, said property was exposed for sale by defendant James I. Lowry, Sheriff; the same was bid in by defendant J. A. Paisley, husband of defendant Mrs. Fannie Paisley, and said defendant James I. Lowry executed a sheriff's deed conveying the said property to the said J. A. Paisley.

15. Said defendant J. A. Paisley, on or about the 15th day of August, 1921, undertook to convey the said property to defendant Claud Brackett, and said Brackett went into possession of said property, and remains in possession of the same

16. Petitioner was not a party to the proceedings designed in paragraphs 7 to 14 of this petition, which resulted and terminated in the sale of said property at sheriff's sale by the defendant James I. Lowry, she had no notice of said proceedings, and she was afforded no opportunity during the course of said proceedings to assert and defend her right to the said property.

17. Petitioner charges that because of the facts set forth in the preceding paragraph, the said sale of said property by defendant Lowry, Sheriff, was, as to petitioner, illegal and void, and passed to defendant J. A. Paisley, none of the interest which petitioner owned and held in said property.

[fol. 19] 18. Petitioner charges, further, that the proceedings hereinbefore set out and described did not, as to petitioner, constitute due process of law within the purview of paragraph 3 of section 1 of article 1 of the Constitution of Ga., (Code section 6359) which provides that "No person shall be deprived of life, liberty or property, except by due process of law," and within the purview of that portion of Section 1 of Article 1 of the Fourteenth Amendement to the United States Constitution which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law;" that petitioner was not a party to said proceedings, had no notice thereof, and had no opportunity during the course of said proceedings to be heard in her own defense. And to allow said sale by defendant James I. Lowry, Sheriff, to divest petitioner of her interest in said property, would be to deprive her of said interest through judicial proceedings to which she was not a party, of which she had no notice, and in the course of which she had no opportunity to be heard, and thus to deprive her of her property without due process of law.

19. The only claim of defendant Claud Brackett to the said property is based upon the conveyance to him of said porperty by defendant J. A. Paisley, and the only interest which defendant Paisley had in said property at the time of his conveyance to defendant Brackett was that acquired through the sale aforesaid by defendant Lowry, Sheriff.

20. Petitioner has never sold or otherwise conveyed her interest in the said property.

21. Petitioner has no adequate remedy at law.

Wherefore, Waiving discovery, petitioner prays,

(a). That the sale by said defendant James I. Lowry, Sheriff be decreed to be null and void, as to petitioner and that the deed executed in pursuance of said sale be decreed to convey no part of [fol. 20] the interest held by petitioner in said property.

(b). That both the deed from defendant James I. Lowry, Sheriff to defendant J. A. Paisley, and the deed from defendant J. A. Paisley to defendant Claud Brackett, be decreed to convey only the interest theretofore held by Miss Pauline Schoenthal, plaintiff in the proceedings mentioned and described in this petition, to-wit: the legal title to said property to secure the loan mentioned in paragraph 3 of this petition.

(c). That petitioner be decreed to be the equitable owner of said property, with the right to the possession thereof, and to redeem the legal title by the payment of the incumbrance against the said property.

(d). That petitioner be awarded such other and further relief as to the Court may seem meet and proper in the premises.

(e). That process issue requiring each and all of the defendants herein named to be and appear at the next term of this Honorable Court to answer petitioner's complaint. And petitioner will ever pray.

Paul Donehoo, N. T. Anderson, Jr., Petitioner's Attys.

Sworn to by Dorothy Scott. Jurat omitted in printing.

[File endorsement omitted.]

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[fol. 21] IN SUPERIOR COURT OF FULTON COUNTY

DEMURRER—Filed March 23, 1923

Now comes Mrs. Fannie Paisley, Claud Brackett and Jas. I. Lowry, and demur to plaintiff's petition in said case, and for cause of demurrer says:

1. That there is no cause of action set forth in plaintiff's petition.

2. That there is no equity in plaintiff's petition.

McElreath & Scott, Attys. for Defts.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

AMENDED PETITION—Filed March 27, 1923

Comes now the plaintiff in the above stated case, and by leave of the Court first obtained, amends her petition as originally filed, in the following particulars, to-wit:

1. By adding thereto, as paragraph 22, the following allegation: Said lot is worth Twenty-five Hundred Dollars, or other large sum greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same.

2. By adding to said petition, as a second count, the following: And for further and other cause of action, petitioner shows:

23. That J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, the defendants herein, are all residents of Fulton Co., Ga., the said J. I. Lowry being sheriff of said county and being sued as such.

24. On the 9th day of Jan. 1917, the said Mrs. Fannie Paisley owned all that tract or parcel of land lying and being in land lot 140 of the 14th District of Fulton County, Ga., and more particularly [fol. 22] described as beginning at a point on the east side of Atwood Street, in the City of Atlanta, one hundred and ninety nine and two-tenths feet south of the southeast corner of Atwood St., and Lucile Ave; I said beginning point being on the south side of a 15 foot alley which runs parallel with Lucile Ave., extending thence south, along the east side of Atwood St., 50 feet; thence east parallel with the alley aforesaid, one hundred and eighty-five feet; thence north parallel with Atwood Ave., fifty feet, to the south side of said alley, thence west along the south side of said alley, one hundred and eighty five feet to the point of beginning.

25. On said date, the said Mrs. Fannie Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal for Five Hundred and Fifty Dollars, with interest at eight per cent per annum payable semi-annually, which said note matured on the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal.

26. Subsequently on the 30th day of July, 1919, said Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, said convevance being made subject to the loan deed referred to in the preceding paragraph.

27. On the second day of Oct., 1919, said H. Calhoun Wilson conveyed said property by warranty deed to petitioner, subject to the loan aforesaid.

28. In purchasing said property, petitioner acted in perfect good faith and without any notice of any defect in the title to said property because of any conflicting claim between the said H. Calhoun

Wilson, and the said Mrs. Paisley, or between the said H. Calhoun Wilson and any other person.

29. Some time prior to the return day of the May term, 1920 of the City Court of Atlanta, the said Miss Pauline Schoenthal, through [fol. 23] her attorneys, notified the said Mrs. Fannie Paisley, of her intention to bring suit, returnable to the May Term, 1920, of the City Court of Atlanta, on the note referred to in paragraph 25 of this petition, and to ask that judgment rendered in said case include ten per cent of principal and accrued interest as attorney's fees.

30. Miss Schoenthal did enter suit on said note, returnable to the May Term, 1920, of the City Court of Atlanta, and said suit was served upon the said Mrs. Fannie Paisley, the said defendant therein named.

31. On the second day of the said May Term, 1920, of said City Court of Atlanta, the said Mrs. Paisley having failed to interpose any defense to the said suit, said case was entered in default.

32. Thereupon the said Miss Pauline Schoenthal, on the 4th day of May, 1920, took a verdict against the said Mrs. Paisley for principal, interest and atty's fees, due on said note and finding in favor of a special lien on the property described in the loan deed mentioned in paragraph 25 of this petition.

33. On the same date, judgment was rendered in accordance with said verdict, and execution issued on said judgment.

34 Thereafter, the said Miss Pauline Schoenthal executed to the said Mrs. Paisley, as defendant in fi. fa., a quit claim deed to the said property, for the purpose of levy and sale, filed the same in the office of the Clerk of the Superior Court of said County, and had the same recorded.

35 Thereupon, defendant James I. Lowry, Sheriff, levied the execution aforesaid upon the property whereon a special lien was declared, and proceeded to advertise the same for sale on the first Tuesday in June, 1920.

36. At the time and place designated in said advertisement, said [fol. 24] property was exposed for sale by defendant James I. Lowry Shff., the same was bid in by defendant J. A. Paisley, husband of the said Mrs. Fannie Paisley, and said defendant James I. Lowry executed a sheff's deed conveying the said property to the said J. A. Paisley.

37. Said defendant J. A. Paisley, on or about the 15th day of August, 1921, undertook to convey the said property to defendant Claud Brackett, and said Brackett went into possession of said property, and remains in possession of the same.

38. Petitioner was not a party to the proceedings described in paragraph 29 to 36 of this petition, which resulted and terminated in the sale of said property at shff's sale by the defendant James I.

Lowry; she had no notice of said proceedings, and she was afforded no opportunity during the course of said proceedings to assert and defend her right to the said property.

39. Petitioner avers that the levy upon said sale of said property by said James I. Lowry, Shff., under the facts and circumstances set forth in this petition, were without authority of law, were as to petitioner illegal and void, and passed none of the right, title or interest in said property held by petitioner.

40. The only pretense of legal authority for the said levy and sale is in the provisions of section 5037 of the Civil Code of Ga. which said section was codified from an Act of the General Assembly approved August 27th, 1872, entitled "An Act to Amend an Act Entitled an Act to Provide for the sales of property in this State to Secure Loans and Other Debts," as said act was amplified and enlarged by an Act approved December 17th, 1894, entitled "An Act to Provide for the Levy and Sale of Property Where the Defendant has an Interest Therein, but Does Not Hold the Legal Title."

41. Said section, as applied to a case in which the grantor in a loan deed, has, between the execution of said deed and the bringing [fol. 25] of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to Paragraph 3 of Section 1 of Article 1 of the Constitution of Ga. (Code, section 6359) which provides that no person shall be deprived of life, liberty, or property, except by due process of law; in that said section provides that one who prior to the institution of proceedings brought to reduce the secured debt to judgment, acquires the interest of the grantor in a loan deed, may be divested of said interest by and through a proceeding to which he is not a party of which he is entitled to no notice, and in the course of which he is not a party, of which he is entitled to no notice, and in the course of which he has no opportunity to be heard in his own defense, and without any judicial proceedings against said owner of said equitable interest in the property; whereas due process of law requires that to divest the said owner of said interest by or through judicial proceedings, he must be a party to said proceedings, must have notice thereof, and an opportunity during said proceedings to assert and defend his rights to the said property.

42. Petitioner charges further that said section as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with and is repugnant to Paragraph 4 of Section 1 of Article 1 of the Constitution of Ga., (Code section 6360) which provides that no person shall be deprived of the right to prosecute or defend his cause in any of the Courts of this State in person, by attorney, or both; in that said section provides that one who prior to the institution of proceedings brought to reduce the secured debt to judgment, acquires the interest of the grantor in

a loan deed, if he may defend against the taking of his property at all, must do so by or through the grantor in said loan deed, and [fol. 26] that he may not defend said cause in person, as guaranteed by said provision of the Constitution.

43. Petitioner charges, further, that said section of the Code, to-wit: Section 6037, is in conflict with, and is repugnant to Paragraph 23 of Section 1 of Article 1 of the Constitution of Ga. (Code, Section 6379) which provides that the legislative, judicial and executive powers shall forever remain separate and distinct; in that said section constitutes an attempt on the part of the Legislature to make an adjudication upon the sole question of indebtedness conclusive as to the liability of specific property, whether in the hands of the defendant or of another, to the payment of said indebtedness and this to strip the courts of their right, function and duty, to inquire into other facts which are essential to the existence of such liability of specific property of the payment of said indebtedness.

44. Petitioner charges further that said section 6037 of the Code, as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to that portion of Section 1 Article 1 of the 14 Amendment to the Constitution of the U. S. (Code, Section 6700) which provides "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", in that said section provides that one who prior to the institution of suit brought to reduce the secured debt to judgment, acquires the interest of the grantor in a loan deed, may be divested of said interest without judicial proceedings against said owner, and by and through a proceeding to which said owner is not a party of which he is entitled [fol. 27] to no notice, and in the course of which he is afforded no opportunity to be heard in his own defense; whereas due process of law requires that to divest said owner of said interest by or through judicial proceedings he must be made a party to said proceedings, must have notice thereof, and must be afforded an opportunity during said proceedings, to assert and defend his right to the said property.

45. Petitioner charges, further, that said section 6037 of the Code, as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person, is in conflict with, and is repugnant to the aforesaid provisions of Section 1 of the Article 1 of the 14th Amendment to the Constitution of the United States, (Code, section 6700); in that said section denies to one who prior to the institution of suit brought to reduce the secured debt to judgment, the right to interpose defenses to the taking of his property under said suit, which could be set up by the grantor in the security deed

if he owned the property, and this denies to such person, acquiring the interest of said grantor in a loan deed, the equal protection of the the laws.

46. Because the unconstitutionality of the statute under which said levy and sale were made by said defendant Lowry, Sheriff, said sale by said defendant Lowry, Sheriff, was illegal and void, and passed to the purchaser at said sale, none of petitioner's right, title or interest in or to the property described in paragraph 24 of this petition.

47. The claim of defendant Claud Brackett to the said property is based upon the conveyance to him of said property by defendant J. A. Paisley, and the only interest which defendant J. A. Paisley had in said property at the time of his conveyance to defendant [fol. 28] Brackett was that acquired through the sale aforesaid by defendant Lowry, Sheriff.

48. Petitioner has never sold, or otherwise conveyed her interest in said property.

49. The lot herein described is worth Twenty Five Hundred Dollars or other large sum, greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same.

50. Petitioner has no adequate remedy at law.

Wherefore, waiving discovery, petitioner prays.

(a). That the sale by said defendant James I. Lowry, Sheriff, be decreed to be null and void as to petitioner, and that the deed executed in pursuance of said sale be decreed to convey no part of the interest held by petitioner in said property.

(b). That both the deed from defendant James I. Lowry, Sheriff, to defendant J. A. Paisley, and the deed from defendant J. A. Paisley to defendant Claud Brackett, be decreed to convey only the interest theretofore held by Miss Pauline Schoenthal, plaintiff in the proceedings mentioned and described in this petition, to-wit: the legal title to said property to secure the loan mentioned in paragraph 25 of this petition.

(c). That petitioner be decreed to be the equitable owner of said property, with the right to the possession thereof, and to redeem the legal title by the payment of the incumbrance against the said property.

(d). That petitioner be awarded such other and further relief as to the Court may seem meet and proper in the premises.

(e). That process issue requiring said defendants and each of them to be, and appear at the next term of this Honorable Court, to answer petitioner's complaint.

Paul Donehoo, N. T. Anderson, Jr., Petitioner's Attys.

[fol. 29] Sworn to by Dorothy Scott. Jurat omitted in printing.

Allowed and ordered filed, subject to objection and demurrer. This March 27th, 1923.

Geo. L. Bell, Judge S. C. A. C.

Service of the foregoing amendment is acknowledged, copy received. All other or further service waived, but right reserved to object to allowance.

This 27th day of March, 1923.

McElreath & Scott, Attys. for Paisley, Brackett & Lowry (Sheriff). J. S. Holliday, D. Clk.

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[fol. 30] In Superior Court of Fulton County

Amended Petition—Filed May 29, 1923

Comes now the plaintiff in the above stated case, and by leave of the Court first obtained, amends her petition as originally filed by striking therefrom Paragraph 17, and inserting in lieu thereof the following: Petitioner charges that by reason of the facts set forth in the preceding paragraph, said sale conveyed none of petitioner's right, title or interest in or to said property to the said J. A. Paisley. Notwithstanding, said defendant J. A. Paisley held said property adversely to petitioner from the time of said sheriff's sale until his conveyance thereof to said defendant Brackett, and said defendant Brackett has since said last mentioned conveyance, held said property adversely to your petitioner.

Paul Donehoo, N. T. Anderson, Jr., Petitioner's Attys.

Sworn to by Dorothy Scott. Jurat omitted in printing.

Allowed and ordered filed subject to demurrer.

E. D. Thomas, Judge S. C. A. C.

This 28th day of May, 1923.

[File endorsement omitted.]

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[fol. 31] In Superior Court of Fulton County

Judgment

The foregoing demurrer coming on to be heard and the plaintiff having amended her petition and the defendants having renewed their demurrer to the petition as amended, after argument of counsel thereon, said demurrer is hereby sustained and plaintiffs petition dismissed with cost of court on the plaintiff.

This June 8th, 1923.

Geo. L. Bell, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

CLERK'S CERTIFICATE—Filed July 26, 1923

I Hereby Certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the Supreme Court of Georgia, in the case of Dorothy Scott, Plaintiff in Error, vs. J. A. Paisley et al., Defendant-in-Error.

I, further certify that on account of the volume of work in office I have been unable to make up and transmit the within record in the time prescribed by law.

Witness my signature and the seal of Court affixed this the 23 day of July 1923.

Arnold Broyles, Clerk Superior Court Fulton County, Georgia, ex Officio Clerk City Court of Atlanta. (Seal.)

[fol. 32] [File endorsement omitted.]

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[fol. 33] IN SUPREME COURT OF GEORGIA

OPINION

Per CURIAM:

Where property encumbered by a deed to secure a debt, under the provisions of the Civil Code, § 3306, was sold, subject to such security deed, by the grantor to a third person, who paid all of the purchase-price except the secured debt which the purchaser assumed and agreed to pay, and took a bond for title from the grantor, and thereafter the grantee in the security deed sued his debtor, the grantor, and obtained a judgment for the amount of the indebtedness so secured, and a special lien upon the property conveyed as security, even though the holder of the bond for title was not made a party to the suit or otherwise notified thereof, the equitable interest of the holder of the bond [illegible] divested by a sale made in compliance with the terms of § 4057 of the Code under the fi. fa. issued on said judgment. Such proceeding did not violate the fourteenth amendment to the constitution of the United States, and the similar provision of our State constitution, which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

Judgment affirmed. All the Justices concur, except Russell, C. J., dissenting.

[fol. 34] The petition of Dorothy Scott alleged in substance as follows: Fannie Paisley, the owner of a certain described tract of land, on January 9, 1917, conveyed said property by security deed

to Pauline Schoenthal to secure the payment of a note executed by her to Miss Schoenthal for $550, which note matured on January 9, 1920. On July 30, 1919, Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, the conveyance being made subject to the above-mentioned security deed. On October 2, 1919, Wilson conveyed said property to petitioner by warranty deed subject to the aforesaid loan. In this purchase petitioner acted in good faith and without notice of any defect which may have existed in the deed from Mrs. Paisley to Wilson. Sometime prior to the return day of the May term, 1920, of the city court of Atlanta, Miss Schoenthal gave notice to Mrs. Paisley that she would bring suit upon the note to said term, and would ask that the judgment rendered include ten per cent. as attorney's fees. She did so enter suit; and on the second day of said term, Mrs. Paisley having failed to interpose any defense to the suit, the same was entered in default. On May 4, 1920, Miss Schoenthal took a verdict against Mrs. Paisley for principal, interest, and attorney's fees due on said note, with a finding of a special lien on the property described in the security deed; and judgment was rendered and execution issued in accordance with such verdict. Thereafter Miss Schoenthal executed to Mrs. Paisley, as defendant in fi. fa. a quitclaim deed to the property, for the purpose of levy and sale, which was properly filed and recorded. The sheriff levied the execution on the property, and advertised it for sale on the first Tuesday in June, 1920, when it was sold and was bid in by J. A. Paisley, husband of Fannie Paisley, and the sheriff executed a deed conveying the property to J. A. Paisley. On or about August 15, 1921, Paisley undertook to convey the property to Claud Brackett, [fol. 35] who took and now holds possession. Petitioner was not a party in the above proceedings, had no notice of them, and was afforded no opportunity to assert and defend her right to said property during the course of said proceedings, and because of her want of notice and opportunity to defend the sale was illegal and void as to her, and passed to Paisley none of the interest which petitioner owned in said property; for which reasons the proceedings hereinbefore set out did not, as to her, afford due process of law within the purview of art. 1, sec. 1, par. 3, of the constitution of Georgia and the like provisions of the Constitution of the United States. "And to allow said sale * * * to divest petitioner of her interest in said property would be to deprive her of said interest through judicial proceedings to which she was not a party, of which she had no notice, and in the course of which she had no opportunity to be heard, and thus to deprive her of her property without due process of law." The only claim of Brackett to the property is based upon the conveyance to him by Paisley, and the only interest that Paisley had at the time of his conveyance was that acquired through the sheriff's sale. Petitioner has never sold or otherwise conveyed her interest. She has no adequate remedy at law. She prays, that the sale by the sheriff be decreed to be null and void as to her; that the sheriff's deed be decreed to convey no part of her interest; that both the deeds from the sheriff to Paisley and from Paisley to Brackett

be decreed to convey only the interest theretofore held by Miss Schoenthal, to wit, the legal title to the property to secure the loan; that petitioner be decreed to be the equitable owner of the property, with the right to possession and to redeem the legal title by the payment of the incumbrance; for other and further relief, and for process.

[fol. 36] The defendants demurred to the petition that no cause of action was set forth, and that there was no equity in the petition.

The petitioner offered an amendment alleging that "Said lot is worth twenty-five hundred dollars or other large sum greatly in excess of the incumbrance held by the said Miss Pauline Schoenthal against the same," and adding a second count in which, after making the same allegations as in the original petition, she alleged that section 6037 of the Civil Code, "as applied to a case in which the grantor in a security deed has, between the execution of said deed and the bringing of suit to reduce the secured debt to judgment, disposed of his interest in the property covered by said deed to a third person," is unconstitutional, because in such case such third person is deprived of his property without due process of law, in violation of the State and Federal constitutions, in that said section provides that the interest of such third person may be divested by a proceeding to which he is not a party, of which he has no notice, and in which he has no opportunity to be heard in his own defense, and without any judicial proceeding against him; and because said section is in conflict with art. 1, sec. 1, par. 4, of the constitution of Georgia, in that it provides that in such case, if said third person may defend at all, he must do so by or through the grantee in the loan deed, and cannot defend the cause in person; and because said section is violative of the provision of the constitution that the legislative, judicial, and executive powers shall forever remain separate and distinct, in that it constitutes an attempt on the part of the legislature to make an adjudication upon the sole question of indebtedness conclusive as to the liability of specific property, whether in the hands of the defendant or of another, to the payment of said indebtedness, and thus to strip the [fol. 37] courts of their right, function, and duty to inquire into other facts which are essential to the existence of such liability; and because said section is violative of the 14th amendment to the constitution of the United States, in that it denies to such third person the right to interpose defenses to the taking of his property under said suit, which could be set up by the grantor in the security deed if he owned the property, and this denies to such person acquiring the interest of said grantor the equal protection of the laws. The petitioner says that for these reasons the sale by the sheriff was illegal and void and passed none of her right, title, or interest in the property to the purchaser at that sale. The further allegation was made Paisley held said property adversely from the time of the sheriff's sale to the time of his conveyance to Brackett, and that Brackett has since held said property.

The defendants renewed their demurrer to the petition as amended. The trial judge sustained the demurrer and dismissed the suit, and exception was taken to this order.

[fol. 38] IN SUPREME COURT OF GEORGIA

JUDGMENT—September 30, 1924

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

DOROTHY SCOTT

v.

J. A. PAISLEY et al.

This case came before this court upon a writ of error from the Superior Court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Russell, C. J., dissenting.

Bill of costs, $15.00.

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[fol. 39] IN SUPREME COURT OF GEORGIA

CLERK'S CERTIFICATE

Atlanta, Ga., January 13, 1925.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, and the original citation, together with true and complete copies of the parts of the record specified in the præcipe in the case of Dorothy Scott, plaintiff in error, vs. J. A. Paisley et al., defendants in error, as appears from the records and files of the Supreme Court of Georgia now in this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written.

W. E. Talley, Deputy Clerk Supreme Court of the State of Georgia. (Seal of the Supreme Court of the State of Georgia.)

Endorsed on cover: File No. 30,822. Georgia Supreme Court. Term No. 253. Dorothy Scott, plaintiff in error, vs. J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett, et al. Filed January 21, 1925. File No. 30,822.

# Supreme Court of the United States

OCTOBER TERM, 1925

No. 253.

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DOROTHY SCOTT, *Petitioner*

*vs.*

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD BRACKETT AND J. I. LOWRY, SHERIFF, *Respondents.*

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WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF GEORGIA.

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(158 Georgia 876)

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## BRIEF IN BEHALF OF DOROTHY SCOTT, PETITIONER.

# INDEX OF SUBJECTS

BRIEF OF ARGUMENT:

# INDEX TO AUTHORITIES CITED

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 253.

DOROTHY SCOTT, Petitioner,
*vs.*
J. A. PAISLEY, MRS. FANNIE PAISLEY,
CLAUD BRACKETT AND J. I. LOWRY,
SHERIFF, Respondents.

WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF GEORGIA.
(158 Georgia 876)

BRIEF IN BEHALF OF DOROTHY SCOTT, PETITIONER.

## STATEMENT OF THE CASE

On the 9th day of January, 1917, Mrs. Fannie Paisley owned a certain tract of land in the City of Atlanta, Georgia. On said date, Mrs. Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal for $550, the maturity date of which was the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal. Subsequently, on the 30th day of July, 1919, Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, who, on October 2nd,

1919, conveyed the same by warranty deed to plaintiff in error, both said conveyances being subject to the loan aforesaid.

Some time prior to the May Term, 1920, of the City Court of Atlanta, Miss Schoenthal, through her attorneys, notified Mrs. Paisley of her intention to bring suit on the note referred to above, returnable to the May Term, 1920, of the City Court of Atlanta, and to ask that the judgment rendered in said case include ten per cent. of principal and accrued interest as attorney's fees. Miss Schoenthal entered suit on said note, returnable to the May Term, 1920, of the City Court of Atlanta, a court of exclusively law jurisdiction, and said suit was served upon Mrs. Paisley, the defendant therein named. On the second day of the said May Term, 1920, of the City Court of Atlanta, Mrs. Paisley having failed to interpose any defense to the said suit, the said case was entered in default. On the same day Miss Schoenthal took a verdict against Mrs. Paisley for the principal and interest due on said note, and for said attorney's fees, and finding in favor of a special lien for said amounts, on the property described in the security deed mentioned above; and judgment was entered in accordance with said verdict. Thereafter, Miss Schoenthal executed to Mrs. Paisley as defendant in fi fa a quit claim deed to said property for the purpose of levy and sale, filed same in the office of the Clerk of the Superior Court of said county, and had same recorded, whereupon James I. Lowry, Sheriff of Fulton County, Georgia, levied the execution issuing upon said judgment upon the property whereon a special lien was declared, as the property of said Mrs. Paisley, and proceeded to advertise the same for sale on the first Tuesday in June, 1920, as the property of said Mrs. Paisley. At the time and place designated in said advertisement, said property was exposed for sale by James I. Lowry, Sheriff, and was bid in by J. A. Paisley, husband

of Mrs. Fannie Paisley. James I. Lowry, Sheriff, executed a sheriff's deed, conveying said property to said J. A. Paisley. J. A. Paisley, on or about August 15th, 1921, undertook to convey said property to Claud Brackett, and said Brackett went into possession of the property and remains in possession of the same. Plaintiff in error was not a party to the proceedings described above, had no notice of said proceedings, and was afforded no opportunity to assert and defend her right to the said property, during the course of said proceeding.

On February 13th, 1923, plaintiff in error filed suit against said J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, alleging the facts above set out, and praying relief against said defendants, who were holding adversely to plaintiff in error. The petition was brought in two counts: the first was based upon the proposition that the proceedings set out, did not under a proper construction of the law of Georgia, divest plaintiff in error of her interest in the land, and that they could not constitutionally deprive her of said interest because they did not accord her due process of law; the second was based upon the proposition that her interest was divested through the operation of section 6037 of the Code, and that said section in providing for the divestiture of plaintiff in error's interest, is repugnant to the Fourteenth Amendment to the Federal Constitution, in that it deprived plaintiff in error of her property without due process of law, and denied her the equal protection of the laws.

The petition as amended was dismissed upon demurrer in the Superior Court, and plaintiff in error took the case by bill of exceptions to the Supreme Court of Georgia, where said dismissal was affirmed, and plaintiff in error's interest in said land held to have been divested, in the following language: "Where property incumbered by a deed to se-

cure a debt, under the provisions of the Civil Code, section 3306, was sold, subject to such security deed, by the grantor to a third person, who paid all of the purchase price except the secured debt which the purchaser assumed and agreed to pay, and took a bond for title from the grantor, and thereafter the grantee in the security deed sued his debtor, the grantor, and obtained a judgment for the amount of the indebtedness so secured, and a special lien upon the property conveyed as security, even though the holder of the bond for title was not made a party to the suit or otherwise notified thereof, the equitable interest of the holder of the bond for title was divested by a sale made in compliance with the terms of section 6037 of the Code, under the fi fa issued on said judgment. Such proceeding did not violate the Fourteenth Amendment to the Constitution of the United States, and the similar provision of our State Constitution, which declares that 'No person shall be deprived of life, liberty or property, without due process of law.' "

## ASSIGNMENT OF ERROR

Plaintiff in error submits that the said judgment of the Supreme Court of Georgia was erroneous in the following particulars, to-wit:

1. The Court erred in holding that the provisions of an Act of the General Assembly of Georgia, approved August 27th, 1872, entitled "An act to amend an act entitled an act to provide for the sale of property in this State to secure loans and other debts," as the same were enlarged and amplified by the provisions of the first section of an act of the General Assembly of Georgia, approved December 17th, 1894, entitled "an act to provide for the levy and sale of property where the defendant has an interest therein, but does not hold the legal title"—which said provisions are embodied in, and constitute section 6037 of the Civil Code of Georgia of 1910—and said section 6037 of the Code, are

not in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, for that the State of Georgia through said provisions of said section, assumes and seeks:

(a) To deprive the plaintiff in error, and other citizens of the United States, of property without due process of law.

(b) To deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Georgia, the equal protection of the laws.

2. The Court erred in not holding that said provisions of said statutes and of said Code section 6037 are in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States on the grounds set out in the preceding assignment of error.

3. The Court erred in holding that plaintiff in error is not, by the provisions of said statutes and by said Code section, deprived of property without due process of law.

4. The Court erred in not holding that plaintiff in error is, by said provisions of said statutes and of said Code section, deprived of property without due process of law.

5. The Court erred in holding that plaintiff in error, in being deprived of her property under said provisions of said statutes and under said Code section, was accorded due process of law.

6. The Court erred in not holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code section, was not accorded due process of law.

7. The Court erred in holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was afforded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes, and by said Code section, was not to deprive plaintiff in error of her property without due process of law.

8. The Court erred in not holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was afforded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes and by said Code section, was to deprive plaintiff in error of her property without due process of law.

9. The Court erred in holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code section, was not to deprive plaintiff in error of property without due process of law.

10. The Court erred in not holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code section, was to deprive plaintiff in error of property without due process of law.

11. The Court erred in holding that said provisions of said statutes and said Code section do not deny plaintiff in error the equal protection of the laws.

12. The Court erred in not holding that the said provisions of said statutes and of said Code section, do deny plaintiff in error the equal protection of the laws.

1. The Statute Defining the Substantive Rights under Security Deeds in Georgia, is merely Declaratory of the Common Law.

The security deed statute of Georgia, sections 3306-3310 inclusive, of the Code, provides that whenever any person in this State conveyed any real property by deed to secure any debt, and shall take a bond for title back to said vendee, said conveyance shall pass the title to said property to the vendee till the debt which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance with the right reserved by the vendor to have the property re-conveyed to him upon the payment of the debt intended to be secured, and not a mortgage.

This statute is not the source of the right to convey the legal title to property as security for a debt. Said right existed at Common Law. Lackey vs. Bostwick, 54 Ga., 45; West vs. Bennett, 59 Ga., 507. "That Act"—referring to the security deed statute—"was not required for the mere purpose of enabling a debtor to pass the legal title as security." West vs. Bennett, 59 Ga., 509.

Nor are the rights of the parties to such a conveyance different, whether the conveyance be made under or independently of the statute. Compare the decisions in Carswell vs. Hartridge, 55 Ga., 412; Johnson vs. Griffin Bank, 55 Ga., 691; Broach vs. Barfield, 57 Ga., 601; and Allen vs. Frost, 62 Ga., 659—wherein the Court dealt with deeds executed under the statute—with the decisions in Biggers vs. Bird, 55 Ga., 650; West vs. Bennett, 59 Ga., 507; Bras-

well vs. Suber, 61 Ga., 398; and Phinizy vs. Clarke, 62 Ga., 623—wherein the deeds before the Court were without the terms of the statute because the wife had failed to join in their execution, as at that time required.

The statute as it was originally passed has two distinctive features: one that the wife must joint in the execution of the deed, and the other that if the debtor should fail substantially to comply with his contract, he should not thereafter have the right to redeem by payment of the secured debt. Georgia laws 1871-1872, page 44. The latter of these provisions was repealed within less than a year after its passage, and the former in 1884, leaving the statute merely declaring the legal effect of a transaction which had identically the same effect without reference to the statute. Biggers vs. Bird, 55 Ga., 650.

In providing that the rights of the grantor in a security deed should not be adversely affected by liens which might otherwise attach against the property by reason of the title's being in the grantee (Code section 3310) the statute worked no change in the rule of law already existing. Note the language of the Supreme Court in Parrot vs. Baker, 82 Ga., 364, where it is said on page 368: "The rule is that the lien of a judgment against the holder of the legal title binds the owner to the extent of the beneficial interest which such owner has in the property." Freeman on Judgments, paragraphs 356 and 357; Ware vs. Jackson, 19 Ga., 452; Corbally vs. Hughes, 59 Ga., 493. The Court thereupon holds that where a judgment debtor holds the legal title to property as security for a debt, it is immaterial whether his acquisition of title occurred under or independently of the security deed statute, since, in either event, the property is bound by the judgment to the extent of the debtor's beneficial interest therein.

2. Section 6037 is not a Substantive Law, Does not enter into the Contract of the Parties, and Plaintiff in Error is not Estopped to Attack same.

Section 6037 reads as follows: "In cases where a contract to purchase has been made, or bond for title made, or the purchase money has been partly paid, or in cases where a deed to secure a debt has been executed, and the purchase money or secured debt has been reduced to judgment by the payee, assignee or holder of said debt, the holder of the legal title, or if dead, his executor or administrator, shall, without order of any court, make and execute to said defendant in fi. fa., or, if he be dead, to his executor or administrator, a quit claim deed to such real or personal property, and file and have the same recorded in the clerk's office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment; or if there be conflicting claims, then the same shall be applied as determined in proceedings had for that purpose.

It is apparent that the section merely provides a remedy, —that it is a purely adjective statute. And a statutory remedy, even though embodied in the same statute which defines the rights to be enforced, does not constitute a part of the contract between the parties unless expressly so provided in the contract, or made exclusive by the statute. Standifer vs Wilson, 93 Tex., 232; Wilson vs Standifer 184 U. S. 399. The remedy provided by section 6037 is not exclusive, since an equitable mortgage foreclosure may be substituted by the creditor; Sloss vs Mutual Building and Loan Association, 97 Ga., 401. or he may recover the property in ejectment and realize his claim out of the rents and profits. Polhill vs Brown, 84 Ga., 338; Gunter vs Smith, 113 Ga., 18; Harris vs Powers, 129 Ga., 82.

"In the proposition often stated in the decisions the parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the co-relative rights and duties springing from it, and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the Legislature to change them." Aikins vs Kingsbury, 151 P., 147; Wilson vs Standifer 184 U. S., 399.

"The distinction between the obligation of a contract, and a remedy given by the Legislature to enforce that obligation, exists, in the nature of things, and without imparing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct." Chief Justice Marshall in Sturges vs Crowninshield, 4 Wheat, 122.

And since section 6037 did not enter into the contract of the parties to the security deed transaction, its mere existence at the time plaintiff in error purchased the property in controversy, created no estoppel against her. If it were otherwise, every remedy existing when a contract is made, however unreasonable, arbitrary or oppressive, and how flagrantly it violates the requirements of notice and a hearing, would constitute due process of law in the enforcement of the contract.

With reference to the question of estoppel, discussed in the paragraph immediately above, see Coe vs. Armour Fertilizer Works 237 U. S. 413. In that case the Florida Supreme Court had held that a stockholder became such charged with notice that under the statute then before the Court an execution might be issued against him for the amount of the unpaid subscription of the capital stock, upon the return of a nulla bona on an execution against the

corporation, and that he was therefore precluded from attacking the statute, but must make his defense, if any, under the provisions of the statute. The United States Supreme Court reversed the Florida Court, sustained Coe's right to attack the statute and declared the statute unconstitutional.

3. The Interest in Property remaining in the grantor after the Execution of a Security Deed under the Law of Georgia, Constitutes Property.

"Our organic law ordains that no person shall be deprived of property without due process of law. No authority need be cited to demonstrate that an equity in encumbred real estate is property, and therefore under the protection of the Constitution." State vs Holtcamp, 151 S. W.. 157. See also Williams vs Foy Mfg., Co., 111 Ga, 857.

The grantor in a security deed has the right to possession of the property conveyed as security, until default in the payment of the secured debt. This has never been questioned, but is so universally recognized as to be treated by the courts as a premise rather than a conclusion. Thus in Braswell vs Suber, 61 Ga., 398, the court in recognizing the right of the grantee to recover the property in ejectment on the title derived from the security deed after the debt is in default, says on page 401: "The debt was unpaid, and if it was not due, or there was some agreement to hinder the change of possession, this was matter of defense."

And after default there is no right in the grantee to oust the grantor without judicial process. Benedict vs Gammon Theological Seminary, 122 Ga., 415.

The grantee in a security deed who recovers the property in ejectment after default in the payment of the debt, is

not entitled to mesne profits except pending the action. Polhill vs Brown, 84 Ga., 338-342.

After recovering the property in ejectment, the grantee must apply rents and profits to the payment of the debt, and when the profits are sufficient to discharge the debt, must re-convey to the grantor. Polhill vs Brown, 84 Ga., 338; Gunter vs Smith, 113 Ga., 18; Harris vs Powers, 129 Ga., 82.

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being." Wells vs Savannah, 87 Ga., 399. Where the legal title to property has been conveyed to secure a debt, the law looks not to the holder of the legal title, but to the beneficial owner for the tax levied upon the property. Central of Georgia Railroad Company vs Wright, 124 Ga., 630; Central of Georgia Railway Company vs Wright, 166 Fed. 153. "Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the tax." Wells vs Savannah, 87 Ga., 399.

4. Said Property may be sold, and the Purchaser acquires all the Interest, and is Subrogated to all the Rights of the Grantor.

When land is conveyed under section 3306 et seq. to secure a debt, the interest pertaining to such land which the grantor thereafter possesses until the debt is paid, is the right to redeem. This right to redeem is an equitable estate in the land, and may be sold and conveyed, subject to the paramount right of the original grantee to have all the land appropriated to the payment of his debt. Williams vs Foy Mfg., Co., 111 Ga., 857.

Where the grantor in a security deed to land subsequently sells the timber on the land to a third person, such third person acquires the right to redeem the land for the purpose of having the title to his timber unincumbered. Williams vs Foy Mfg., Co., 111 Ga., 857. Where land is purchased from the executor of the grantor in a security deed, the purchaser has the right to tender the amount of the secured debt, and the creditor cannot refuse the tender on the ground that it is made by such purchaser, instead of by his debtor's executor. Loftis vs Alexander 139 Ga., 346.

Central of Georgia Ry. Co. vs Wright, 166 Fed. 153, was a case in which the Central Railroad and Banking Company had conveyed the legal title to certain stock as security for a debt, under the provisions of section 3306, et seq., of the Code. Subsequently the same company sold the stock, subject to the security deed, and by a succession of conveyances the stock eventually came into the hands of the Central of Georgia Ry. Company. The record disclosed no agreement between the successors in interest to the Central Railroad and Banking Company, and the holder of the legal title. The court in that case held, on page 158: "So far as the records show, the same situation exists as to voting stock, election of officers and control and collection of dividends, that existed between the old Central Railroad and Banking Company and the Central Trust Company; and the status between the complainant company and the Central Trust Corporation, to my mind, is the same as though the stock had been transferred by the present company in the same manner and under the same terms and conditions that it was transferred and pledged by the old Central."

5. Plaintiff in Error was Divested of her property through the Operation of Section 6037, Contrary to Settled Usages and Modes of Procedure, and in Derogation of the Common Law and Equity.

The case of Mattlage vs. Mulherrin, 106 Ga., 834, and the present case, plainly hold that the rights of persons occupying the status of plaintiff in error, are divested by the procedure outlined in section 6037. Mattlage vs Mulherrin is the only case ever decided by the appellate courts of this State, which explains how the procedure operates to divest such interest. The Court in that case holds, (pages 838-839) that the suit required under the foreclosure statute, section 6037, operates as a quasi proceeding in rem to bind the defendant and all other persons claiming under the defendant by conveyance executed subsequent to the record of the security deed.

The proceeding could not, except for the statute, operate as a proceeding quasi in rem. The suit is a plain action at law on a note, the purpose of which is to reduce to judgment a debt. Edenfield vs. Bank of Millen, 7 Ga., App., 645. And it is not necessary that either the suit of the judgment specify a special lien on the property. Coleman vs. Slade, 75 Ga., 61; Gillespie vs. Hunt, 145 Ga., 490.

And operating as a proceeding quasi in rem, the suit and judgment could not, except for the statute, establish a lien upon the property of any person except the parties to the suit, or in any way bind third persons. Actions quasi in rem differ, among other things, from actions which are strictly in rem in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties. Freeman vs. Alderson, 119 U. S., 185-188, see page 187; Stroupper vs. McCauley, 45 Ga., 74; Gassert vs Strong, 98 P., 497, see pages 500 and 501; Dulin vs. McCaw, 39 W. Va., 721, 726; see also Bartero vs. Real Estate Savings Bank, 10 Mo. App., 76-79; Woodruff vs. Taylor, 20 Vt., 65-76.

Mattlage vs. Mulherrin analogizes the operation of section 6037 to the operation of the mortgage foreclosure statute (present Code, section 3276 et seq.). Concerning the actual operation of the latter statute, the Supreme Court of Georgia, says, in Williams vs. Terrell, 54 Ga., 463; "Can it be possible that it was the intent of the law that one not a party should be absolutely bound by a judgment against a third person declaring his land to be subject to the mortgage, fixing the amount of it, declaring it still to be subsisting, etc., and that, too, when at the date of the proceeding, the mortgagor had parted with all his interest?" Then, after reviewing the prior decisions of the Supreme Court, the Court holds that a purchaser subsequent to the mortgage but prior to the institution of foreclosure proceedings, is not bound by the mortgage foreclosure.

A fortiore, the suit could not operate as a proceeding in rem, as distinguished from a proceeding quasi in rem. In Webster vs. Reed, 11 Howard, 459, the Court holds as follows: "No person is required to answer in a suit, on whom process has not been served, or whose property has not been attached. In this case, there was no personal service not attachment or other proceeding against the land until after judgment. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

Not only would the general law not have required plaintiff in error to make defense in the suit provided by section 6037, but the section itself prohibits her doing so. Loftis vs. Alexander, 137 Ga., 65.

6. Plaintiff in Error was not Properly Privy to Said Judgment.

It is obvious from the decision in Mattlage vs. Mulherrin, referred to above, that purchasers of the equitable interest

in land, subsequent to the execution of a security deed, are, in the proceeding prescribed by section 6037, dealt with as privies to the foreclosure judgment, so as to have their rights divested by a sale thereunder.

It is expressly held, however, in Marshall vs. Charland, 106 Ga., 42, that one who acquires an interest in property covered by a security deed is not privy to a judgment of foreclosure under section 6037, rendered in a suit commenced after his acquisition of title. It will be noted that this case was decided prior to the case of Mattlage vs. Mulherrin, and that it was not overruled.

Such so-called privity does not exist independently of said foreclosure statute. "It is well understood, though not usually stated in express terms, in works upon the subject, that no one is a privy to a judgment, whose succession to the rights of property thereby affected, occurred previously to the institution of the suit." Morris vs. Murphy, 95 Ga., 307-310. "Where the doctrine of lis pendens applies, privies are concluded by a final judgment on the merits in a case pending when they purchased; but there is, perhaps, no instance in the whole law where privies in estate are held affected by the result of litigation in a suit commenced by or against a predecessor in title after he has transmitted all the title he ever had." Rucker vs. Womack, 55 Ga., 399.

And that this rule is not changed in a case where the judgment is rendered in a suit brought to enforce a lien upon property which has been sold subject to the security deed, see Williams vs. Terrell, 54 Ga., 462; Marshall vs. Charland, 106 Ga., 42.

7. The Judicial Proceeding Prescribed by Section 6037, did not Accord Plaintiff in Error Due Process of Law.

(a.) Because she was not a party to same.

It is a fundamental principle of due process of law that the rights of a person may not be affected by judicial proceedings to which he is not a party. 12 Corpus Juris, 1227; Carsten vs. Pilsbury, 158 P., 218; Archuleta vs. Archuleta, 123 P., 821; State vs. Guilbert, 47 N. E, 551.

Plaintiff in error was not a necessary party to the proceeding brought under section 6037 in the present case. Brooks vs. Lowry National Bank, 141 Ga., 293. She was not even a proper party to that proceeding. Loftis vs. Alexander, 137 Ga., 65.

(b). Because she did not have proper Notice of Same.

Notice to one whose rights are to be affected by judicial proceedings, is an essential element of due process of law. Coe vs. Armour Fertilizer Works, 237 U. S., 413; Pennoyer vs. Neff, 95 U. S., 714; Windsor vs. McVeigh, 93 U. S., 274.

And the statute authorizing the proceeding must affirmatively require notice, or it will be unconstitutional. Coe vs. Armour Fertilizer Works, cited above; Stewart vs. Palmer, 74 N. Y., 183.

The statute in question did not require, either expressly or impliedly ,any notice to plaintiff in error of the proceeding through which her property was to be divested. Loftis vs. Alexander, 137 Ga., 65; Brooks vs Lowry National Bank, 141 Ga.; 293; and the present case.

The levy after judgment is not sufficient to meet the requirements of due process of law as to notice. See Pennoyer vs. Neff, 95 U. S., 714, in which it is held that notice to a person whose rights are to be affected by judicial proceedings, is essential to give jurisdiction, and that a levy

upon his property after judgment is not the required notice. See also, Webster vs. Reed, 11 Howard, 459.

(c) Because she had no Opportunity to be Heard in the Course of Same.

To deprive a person of his property by or through judicial proceedings in the course of which he is afforded no opportunity to be heard, constitutes a denial of due process of law. Windsor vs. McVeigh, 93 U. S., 274; Coe vs. Armour Fertilizer Works, 237 U. S., 413.

And the statute authorizing the proceeding must, to be constitutional, provide for such hearing. Stewart vs. Palmer, 74 N. Y., 183; Coe vs. Armour and Company, above cited.

A hearing cannot be dispensed with on the assumption that the party to be affected has no defense to offer, or that if a hearing were allowed, the same result would be reached. Coe vs. Armour Fertilizer Works, supra., Reese vs. Watertown, 19 Wall, 107-123.

Plaintiff in error was not, by the provisions of section 6037, afforded any opportunity for a hearing in the foreclosure proceedings through which she was deprived of her property. Not being a party to the proceedings, nor allowed to intervene therein, (Loftis vs. Alexander, 137 Ga., 65) she could not defend as a party. And for the same reason, motion in arrest of judgment, or to set aside the judgment, was not open to her. Code, section 5957; Merchants Bank vs. Haiman, 62 Ga., 624-628; Jones vs. Smith, 120 Ga., 642. And for the same reason, an affidavit of illegality or motion to quash the execution on the ground that she had not had her day in court, was not available. Code, section 5305 Walker vs. Equitable Mortgage Company, 112 Ga., 645; Artope vs. Barker, 72 Ga., 186; City of Atlanta vs. Seaboard Air Line Ry. Co., 137 Ga., 805.

8. Levy and Sale Prescribed by Section 6037 does not of itself Constitute a Proper Summary Proceeding to Deprive Plaintiff in Error of her Equity.

As has already been set out, the levy prescribed by section 6037 has been held to be based upon the judgment in the foreclosure suit required. Mattlage vs. Mulherrin, 106 Ga., 834. Plaintiff in error could not, therefore, be required to wait until her property was seized for sale, to make her defense. Riverside Cotton Mills vs. Menefee, ~~237~~ 237 U. S., 189.

Had the Supreme Court of Georgia and of the United States not held as above set out, the levy and sale prescribed by section 6037 could not be considered a summary proceeding by which the rights of plaintiff in error were divested.

In the case of Coe vs. Armour Fertilizer Works, 237 U. S., 413, the question whether a levy and sale under a writ of execution, can constitute a valid summary proceeding, is presented and decided in the negative. The Court holds, in that case, that the writ of execution cannot, of itself, be treated as equivalent to a writ of attachment, establishing a lien on the property levied upon, but going no further until the owner has had an opportunity to show cause why that property should not be subjected to the payment of the execution. "Not only is such a purpose wholly unexpressed in the writ itself, buf such is not its normal function or effect; no day in court is named, and there is no provision for notice or monition by service, publication, mailing or otherwise." And there is no distinction between the effect of the execution in that case, and an execution which issues upon a judgment rendered under the provisions of section 6037. See also, Windsor vs. McVeigh, 93 U. S., 274. 23 L. Ed., 914 (see page 916).

It is true that there are instances of summary proceedings wherein, upon a seizure of his property under specially provided process, the owner is required to make his defense to the claim asserted against him before his property is disposed of under such process, or forfeit his right to a hearing. And it is also true that section 5157 et seq., of the Code of Georgia, provide generally that whenever an execution or other process is levied upon property, persons other than the defendant in execution may interpose claims, and thus present to the court the issue whether such property is subject to levy under such execution.

But the Supreme Court of Georgia has held that the claims laws of this State are permissive and cumulative only, that the true owner of property is not bound to interpose a claim when his property is levied upon, and that a mere failure to do so does not bar the true owner from subsequently asserting his right to the property. Bodega vs. Perkerson, 60 Ga., 516; Sears vs. Bagwell, 69 Ga., 429; McLennan vs. Graham, 106 Ga., 211. And it is submitted that such an optional mode of defense, granted as a matter of favor or privilege, is not a substantial substitute for the due process of law which the United States Constitution, 14th Amendment, requires. Coe vs. Armour Fertilizer Works, 237 U. S.. 413.

If the levy and sale prescribed by section 6037 could be treated as a summary proceeding, and the right to claim as furnishing an opportunity for a hearing in said proceeding, the remedy afforded by a statutory claim in Georgia, still does not provide such a hearing as is required as an element of due process of law. "Where a security deed is given to secure a note, and after judgment is obtained on the note, the land re-conveyed, and execution levied thereon, a claim is filed by a third person, proof of possession of the land by the grantor in the security deed at the time of the

execution of such deed is sufficient to make a prima facie case against the claimant, in favor of the plaintiff in fi fa." Ford vs. Nesmith, 117 Ga., 211. The judgment, the rendition of which claimant had no opportunity to contest, is presumed to have properly and correctly adjudicated every other fact necessary to uphold the levy; and it is incumbent upon the claimant to defeat the taking, rather than upon the plaintiff in execution to justify it. Ford vs. Nesmith, 117 Ga., supra. To afford plaintiff in error, and others similarly situated, no other opportunity to be heard, and require her to resort to such a proceeding on pain of losing her rights, would be to convert an estate in possession into a mere cause or right of action. Martin vs. White, 100 P., 293. The right of a person to prosecute a claim to prevent the unlawful sale of his property, cannot be substituted for the hearing required by the constitution as a condition precedent to the taking of such property, for "a person who has the legal right, and is actually or constructively in possession, can never be required to take active steps against opposing claims." Groesbeck vs. Seeley, 13 Mich., 329-342.

Section 5158 of the Code provides that in order to prosecute a statutory claim, the claimant must give bond upon which, it is provided in section 5169, he is subject to a judgment for such damages—not less than ten per cent.—as the jury may assess against him on the trial of the claim case.

Moreover, if the levy and sale provided by section 6037 had been held, or could be held, to operate as a summary proceeding, it would be unconstitutional as set out in Parsons vs. Russell, 11 Mich. 113, which holds that a statute which provides for the seizure and sale of property on a mere assertion of a debt or demand against it, without any proof or affidavit to substantiate the claim, is unconstitutional.

9. Such Taking as is Authorized by Section 6037, cannot be Justified as an Exercise of Police Power.

Although the Georgia Supreme Court did not in this case base its decision upon police power, plaintiff in error offers to show that if such had so based its decision the statute could not thereby be justified.

To justify an interference with private rights, under the police power, it must appear not only that such interference has for its object the public good, as held in Lawton vs. Steele, 152 U. S., 133, but also that the means employed tend to the accomplishment of that object. 12 Corpus Juris, 930; People vs. Weiner, 110 N. E., 870.

No good flows to the public from the provisions of section 6037. On the contrary, great and manifest evil flows from them. They constitute an open invitation to the perpetration of frauds upon true owners of property, in that they enable a creditor to collude with a former owner in effecting a stealthy foreclosure Note the fact that it was the husband of the defendant in foreclosure who purchased the property at foreclosure sale in the present case. Paragraphs 14 and 36 of Plaintiff's amended petition, pages 9 and 12, respectively, of the Transcript of Record.

A judgment may be secured in a section of the state distant from the county in which the land lies, and in which the true owner resides, and the effect of such judgment is not only to authorize a sale of the property to satisfy an alleged obligation, but to increase the burden of that obligation by the addition of a per centage of principal and interest as attorney's fees. Guarantee Bank & Trust Company vs. American National Bank, 15 Ga. App., 778. And all the while, the owner of the property may be in search of an illusive security deed holder. Such action is possible in the face of the fact that under section 4252 of the Code, an

agreement to pay attorney's fees in addition to principal and interest, is unenforcible except in a suit brought on the instrument containing such agreement, after notice to the debtor; see said section; the right to recover attorney's fees at all being based upon the necessity of entering suit ofter such notice.

But, it is respectfully submitted, the extent to which a state may go in curtailing the rights of its citizens generally, is not involved in the present case. The right to notice of, and an opportunity to be heard in, a judicial proceeding through which rights are to be divested or affected, although such proceeding be authorized pursuant to the police power, cannot be taken away. 12 Corpus Juris, 1229; Smith vs. Board of Medical Examiners, 140 Iowa, 66.

"Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing." Ochoa vs. Hernandez y Morales, 230 U. S., '57 L. Ed., 1429-1436.)

It has been shown that section 6037 as construed by the Supreme Court of Georgia, operates to take from a person occupying the status of plaintiff in error, his property and give it to the purchaser at the sale held pursuant to said section, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing. And a statute which attempts to work such a change of ownership is a glaring violation of the constitution, and cannot be defended as an exercise of the police power. 6 R. C. L., 436; Burdick vs. People, 36 N. E., 948.

Respectfully submitted,

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Attorneys for Petitioner, Dorothy Scott.

(21)



IN THE

# Supreme Court of the United State

NO. 253

OCTOBER TERM, 1925

DOROTHY SCOTT,
*Plaintiff in Error*

*vs.*

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUDE BRACKETT, AND J. I. LOWRY, SHERIFF,
*Defendants in Error*

WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF THE STATE OF GEORGIA
(158 Ga. 876.)

## BRIEF FOR DEFENDANTS IN ERROR

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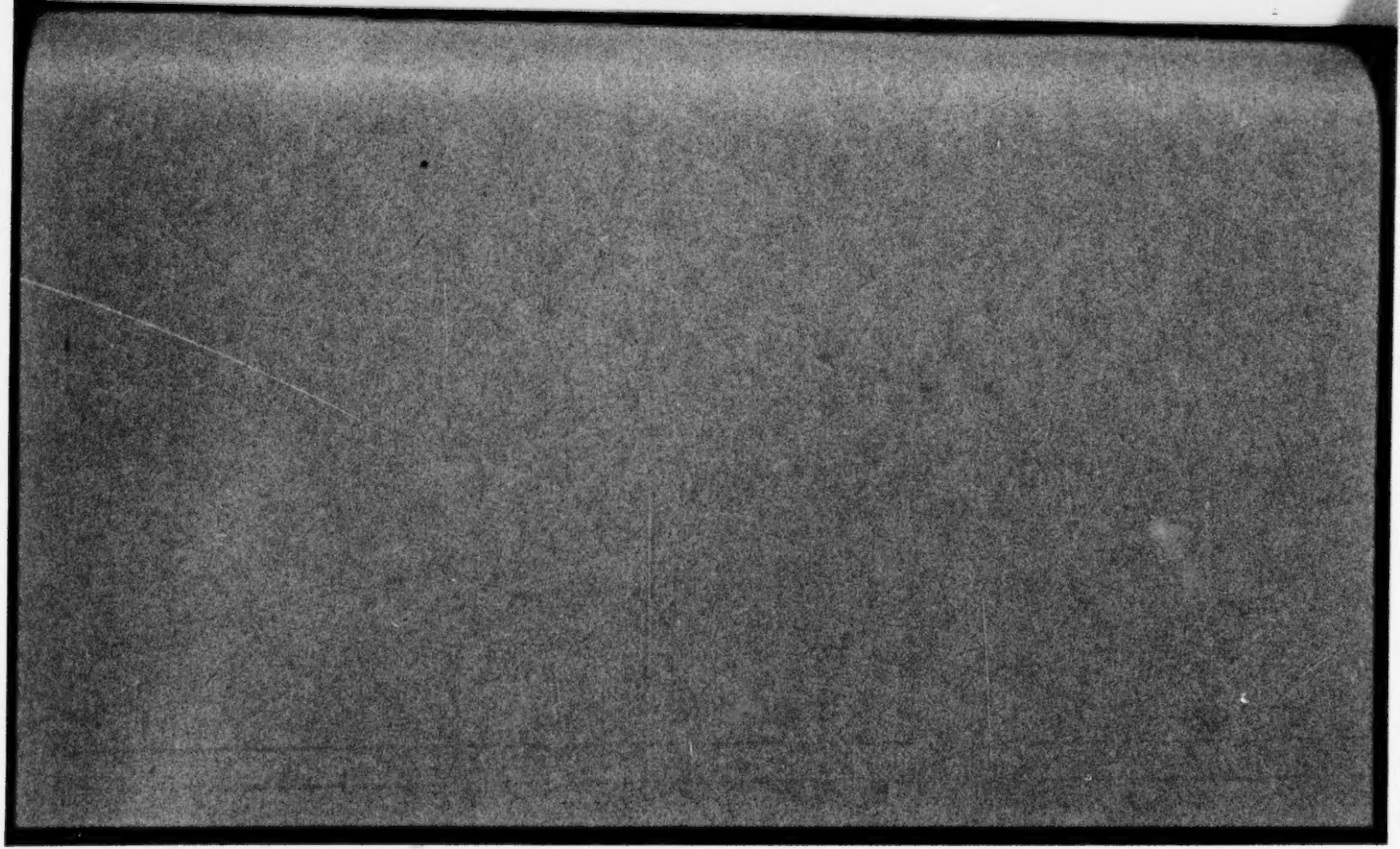

## INDEX TO SUBJECTS AND BRIEF OF THE ARGUMENT

## INDEX TO AUTHORITIES CITED

## INDEX TO AUTHORITIES CITED—Continued

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**WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF GEORGIA (158 GA. 876)**

## PRELIMINARY PROPOSITIONS

Without regard to the constitutional validity of the Statute raised by the bill of the plaintiff in error, her suit was properly dismissed in the Court of original jurisdiction on general demurrer, for want of equity,

FIRST: Because the action being a suit in equity, it was not maintainable for the reason that the plaintiff had an adequate remedy at law, and was guilty of inexcusable laches in asserting her alleged rights.

SECOND: Because plaintiff was not in position to attack the constitutionality of the Statute called in question, for the reason that her suit failed to show that she had

ever made any offer to redeem the property, the right to redeem which she prayed, or any reason why such offer of redemption had not been made, nor did she in her suit make any tender of redemption or allege a readiness, willingness or ability to redeem.

FOURTH: Because, the plaintiff in error not having come into actual collision with the Statute in question, her suit in the Court of original jurisdiction, was the anticipatory raising of an abstract question of the constitutional validity of a law, and was a moot case in the Court of original jurisdiction, and is a moot question upon her writ of error in this Court, and her writ of error should be here dismissed.

## ARGUMENT AND AUTHORITIES ON THE FOREGOING PROPOSITIONS

The suit of plaintiff in error shows that the real estate in question was conveyed to her subject to the loan for the satisfaction of which the property was sold and conveyed by the Sheriff to the predecessor in title of the defendant Brackett, and that she held the property from the 2nd day of October, 1919, the date of the conveyance to her, until the 13th day of February, 1923, the date of the filing of her suit (R. 8, par. 4, 5). It further appears that the property was sold by the Sheriff under execution for the loan, which she had assumed, on the first Tuesday in June, 1920.

Under the laws of Georgia, the plaintiff in error at all times from the time of the conveyance of the property to her and until the sale by the Sheriff, had the right to redeem the property.

In the case of *Loftis vs. Alexander, 139 Ga., 346*, the Supreme Court of Georgia, holds, that—"In this State a deed to secure a debt is not the same as a mortgage. Such a deed

conveys title; a mortgage is only a lien. But a deed of that character is in several particulars similar to a common law mortgage; and one of them is as to the right of one who buys the property from the maker of the deed and obtains an equitable interest therein to protect his purchase by paying off the secured loan, especially where as part of the contract of purchase, he agrees to make such payment."

It is obvious, therefore, that any time prior to the first Tuesday in June, 1920, under the law, as it existed in the State of Georgia, the plaintiff in error could have tendered the amount of the loan with interest and costs accrued and demanded a reconveyance of the property to her, or a satisfaction on the record of the loan deed, which under the law of Georgia would have amounted to a reconveyance (Code of Georgia, (1910) §3309. Printed in the margin).*

Applying the rule that equity aids only the vigilant and not those who slumber on their rights, plaintiff in error had no standing in equity in the Court of original jurisdiction. From the 2nd day of October, 1919, when the property in question was conveyed to the plaintiff in error, by warranty deed, subject to the outstanding loan (R. 8, par. 5), by the very terms of the conveyance to her she had notice of the loan; that the interest was payable semi-annually and that said loan matured on the 9th day of January, 1920 (R. 7, par. 8). After securing a conveyance to herself of the property, she went to sleep and slept on until after the

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*GEORGIA CODE OF 1910 §3309.

In all cases where property is conveyed to secure a debt, the surrender and cancellation of such deed in the same manner that mortgages are now canceled, on payment of such debt to any person legally authorized to receive the same, shall operate to reconvey the title to said property to the grantor, his heirs, executors, administrators, or assigns, and such cancellation may be entered of record by the Clerk of the Superior Court in the same manner that cancellations of mortgages are now entered.

maturity of the note and until after suit was entered on the note to the May Term, 1920, of the City Court of Atlanta (R. 8, par. 8). She slumbered through the default entered in the suit upon the note; through the rendition of a verdict and judgment and the issue of an execution, the levy of an execution, the filing and record in the office of the Clerk of the Superior Court of Fulton County, Georgia, of a quitclaim deed for the purpose of levy and sale; through a levy; through all the time that the property was being advertised by the Sheriff for sale, and on past the sale which was had on the first Tuesday in June, 1920, (R. 8, par. 8, 9, 10, 11, 12, 13) (R. 14), and continued to slumber on for a period of three years after the sale, finally waking up on the 13th day of February, 1923, without performing any act for the redemption of the property, and then merely submitting to the Court, in her suit, an abstract question whether or not she had any right of redemption in the property.

It is equally apparent that after the sale by the Sheriff, if the plaintiff in error desired to redeem and to test the validity of the Statute under which the Sheriff's deed had been made, she could have tendered the amount deemed by her necessary to redeem to the holder of the title under the Sheriff's Deed. If the tender had been accepted, no resort to the courts, either in law or in equity, would have been necessary. If the tender had been refused she could then have made a continuing tender, demanded possession of the premises, upon refusal of possession she could have sued in ejectment for the land, and upon resistance upon the title derived from the Sheriff she could have then raised the question of the validity of the Statute under which the Sheriff's deed was made as a practical question, and not as an abstract proposition, as the same was made in her suit in equity.

Hence, the plaintiff was not only guilty of laches in asserting the right claimed by her but had an adequate rem-

edy at law, and her suit was, consequently dismissed upon general demurrer for want of equity in her petition.

Furthermore, when the suit of the plaintiff in error presented the question of the constitutional validity of the Statutes involved, the court of original jurisdiction was confronted with the decisions of the Supreme Court of Georgia, binding as authority upon it, as to whether the petitioner stood in such relation to the Statutes as to be able by her bill to call in question the constitutional validity of such Statutes. Plaintiff's suit failing to show that she had ever made any offer to redeem the property, the right to redeem which she prayed, or any reason why such offer of redemption had not been made, nor, in her suit, any tender of redemption, or any allegation of a readiness, willingness or ability to redeem, said suit was properly dismissed on demurrer for want of equity.

In the case of *Vestel vs. Edwards, 143 Ga., 368, 372,* the plaintiff attacked a Statute of the State of Georgia as repugnant to the due process of law clause of the State of Georgia and of the United States, and as denying the equal protection of the laws, on account of certain alleged duties and powers conferred upon the State Tax Commissioner, but it appearing from the record that the Tax Commissioner had not exercised the duties imposed upon him so far as the same related to the case at bar, the court held that any discussion or decision of the act relatively to the plaintiff would be moot, adding—"Until that official has exercised the authority conferred upon him by the act to the detriment of the plaintiff, the latter cannot attack the act with respect to the authority thus conferred."

In the case of *Scoville vs. Calhoun, Ordinary, 76 Ga. 263,* it was held—"When a law operates upon the private property of an individual, and it is *seized, destroyed or confiscated, or the individual is indicted for a violation of such law,* he may assail the portion thereof affecting his private property or personal liberty as unconstitutional, and the

courts will make such adjudication as will maintain the integrity of the law as a whole, if possible, and at the same time, protect the citizen against any illegal portions of the law, if there be such." (Italics mine.) This case is cited upon the proposition that the law must actually impinge upon the rights of the person attacking it, before its constitutionality will be passed upon by the Courts.

In the case of *Tolbert vs. Long, 134 Ga., 292,* it was held that where a statute claimed to be unconstitutional was to become operative only after ratified by a popular election, an attack on it would not be sustained prior to the holding of the election, and in the case of *White vs. The City of Atlanta, 134 Ga., 532,* it was held that it was not necessary to pass upon the constitutionality of a Statute until some person affected by the Statute should seek appropriate relief in regard thereto.

The decisions of this court are in accord with the decisions of the Supreme Court of Georgia, that before a person can have relief at the hands of the courts against an unconstitutional law he must have actually suffered, or be actually threatened with an injury to his person or property by the operation of the law, or that the law prevents him from the exercise of some right which he has attempted to exercise.

In the case of *Turpin vs. Lemon, 187 U. S. 51,* it is held that "A plaintiff is bound to show that he has personally suffered an injury by the application of a law before he can institute a bill for relief to test its constitutionality."

In the case of *Williams vs. Hood, 98 U. S., 72,* it is held that "Where a bill shows no equity in the complainant and contains no averment that he has been injured by certain statutes of a State, this court will not pass upon an abstract question the object of which is plainly to obtain a decision touching their constitutionality, but will dismiss the bill without prejudice."

The same principle was applied in the following cases:

*Tyler vs. Judges of Court of Registration, 179 U. S. 405;*

*Clark vs. Kansas City, 176 U. S. 114;*

*Lampasas vs. Bell, 180 U. S. 276;*

*Ludeling vs. Chaffee, 143 U. S. 301;*

*Giles vs. Little, 134 U. S. 645;*

*Hooker vs. Burr, 194 U. S. 415.*

It is the duty of the court to give decisions in actual controversies, and not to give opinion upon moot questions or abstract propositions of law.

*American Book Co. vs. Kansas, 193 U. S. 49;*

*Mills vs. Green, 159 U. S. 651;*

*Marye vs. Parsons, 114, U. S. 325.*

Nor will the Court sustain a writ of error, where it appears that the plaintiff may have a right which he intends to assert but which he has not yet asserted.

*Singer Mfg. Company vs. Wright, 141 U. S. 696.*

A fair interpretation of the suit of the plaintiff in error is that it invokes a decision of the Court upon an abstract question as to the existence of a right which she has never attempted to exercise and which she is not bound to exercise, and which she might never exercise, if the Court should hold that she has such a right. The question is, therefore, moot, and her writ of error should be dismissed.

## NATURE OF THE SECURITY DEED PROVIDED FOR UNDER §3306 AND THE REMEDY PROVIDED FOR UNDER §6037 OF THE CODE OF GEORGIA, (Printed in the margin).*

The deed to secure a debt provided for under §3306 of the Code of Georgia is analogous to and, in legal principle, identical with a trust deed with a power of sale under §6037. The making of a conveyance under §3306 invests the lender with the legal title to the property to be held in trust by the lender as security for the loan secured by the deed, and in trust to reconvey the legal title to the borrower, or to such person as the borrower may have conveyed the property to subject to the outstanding loan deed, upon payment of the loan. The equitable title to the property conveyed, for the want of a better term, usually denominated the "equity of redemption," with the right to occupy the property and enjoy its rents, issues and profits pending default by the borrower and the sale of the conveyed property remains in the borrower.

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*GEORGIA CODE OF 1910 §3306.

Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property is conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the Courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage.

A security deed under §3306 of the Code of Georgia, is not a mortgage, but is an absolute conveyance of the legal title.

*Code of Georgia, §3306;*

*Burkhalter vs. Planters Loan & Savings Bank, 100 Ga., 428;*

*Jewell vs. Walker, 109 Ga., 241;*

*Shumate, Executor, vs. McLendon, et al 120 Ga., 396;*

*Woodall vs. Jewell, 140 U. S. 247, 251.*

While such a deed is not any where specifically called a trust deed, it is such by its very nature. The author of Perry on Trusts, (Fifth Edition, §150), says, upon the authority of *Morice versus Bishop of Durham, 10 Ves. 537, and Pace vs. Canterbury, 14 Ves. 370,* that—"A very common case of a resulting trust is where the owner of both

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*GEORGIA CODE OF 1910 §6037.

In cases where a contract to purchase has been made, or bond for title made, or the purchase money has been partly paid, or in cases where a deed to secure a debt has been executed, and the purchase money or secured debt has been reduced to judgment by the payee, assignee, or holder of said debt, the holder of the legal title, or, if dead, his executor or administrator, shall, without order of any court, make and execute to said defendant in Fi. Fa., or, if he be dead, to his executor or administrator, a quitclaim conveyance to such real or personal property, and file and have the same recorded in the clerk's office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment; or if there be conflicting claims, then the same shall be applied as determined in proceedings had for that purpose.

the legal and equitable estate conveys the legal title only, without conveying the equitable interest."

The remedy provided in §6037 is substantially a mere power of sale under a trust deed to be exercised by the holder of the loan deed in accordance with Statutory conditions of extreme caution thrown around the exercise of the power; that is, before the secured creditor can exercise his power of sale, he must first file a suit upon the note given for the loan in some Court of competent jurisdiction having jurisdiction over the person of the original grantor under the loan deed and, by competent proof, establish the validity of the original conveyance, the amount of the indebtedness owing at the time of the filing of such suit and the existence of a default on the part of the debtor, and claim a special lien upon the land under the original security deed. Having obtained such judgment the holder of the legal title under the security deed, is then authorized to proceed to sell the property for the satisfaction of the debt, but he is required first to file and have recorded a deed to the original grantor against whom judgment has been obtained for the purpose of levy and sale. This deed so recorded is

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*GEORGIA CODE OF 1910 §3307.

Every such deed shall be recorded in the county where the land conveyed lies; every such bill of sale, in the county where the maker resided at the time of its execution, if a resident in this State. If a non-resident, then in the county where the personalty conveyed is. Such deeds or bills of sale not recorded remain valid against the persons executing them, but are postponed to all liens created or obtained, or purchases made, prior to the actual record of the deed or bill of sale. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded deed or bill of sale, or if the purchaser has the like notice, then the title conveyed by the older deed or bill of sale shall be held good against them.

constructive notice to the world of the intention of the judgment creditor to have the property sold.*

Having re-invested the original grantor with the legal title for the purpose of levy and sale the judgment creditor is then permitted to have a levy made by the Sheriff of the County where the land lies and a sale of the property made for satisfaction of the secured debt. Instead of being allowed to advertise and conduct this sale in some irregular manner as is usually the case under the stipulations of an ordinary trust deed, this sale can only be made after advertisement by the Sheriff in the public gazette in which all judicial sales by the Sheriff are advertised and the sale is made at the time and place of holding the Sheriff's sale and such sale under such power destroys the so-called equity of redemption of the borrower.

## THE MAIN PROPOSITION

*The Statute contained in §3306 and §6037 of the Code of Georgia are not repugnant to the due process clause of the Constitution of the United States, nor did they deny to the plaintiff the equal protection of the laws, although the so-called "equity of redemption" claimed by the plaintiff in error was completely extinguished by the Sheriff's Sale.*

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GENERAL STATUTE FOR RECORDING DEEDS.

*GEORGIA CODE OF 1910 §4198.

Every deed conveying lands shall be recorded in the office of the Clerk of the Superior Court of the County where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first.

## ARGUMENT AND AUTHORITIES ON ABOVE PROPOSITION

The law under which the loan deed in question in this case was made and the remedy provided for the holder of the secured debt upon default of the borrower, were in force in their present form when the loan deed was executed and plaintiff in error bought the land subject to all the rights and remedies provided in the then existing law.

Section 3306 of the Code of Georgia, is a codification of an Act of the General Assembly of Georgia, passed at the Session of 1871-2, and approved on December 12th, 1872 (Georgia Laws 1871-2 pp. 44, 45), as amended by an Act approved August 27th, 1872, (Georgia Laws of 1872, p. 47), and as further amended by an Act approved on October 16th, 1885 (Georgia Laws of 1884-85, p. 57). Section 6037 of the Georgia Code, is a codification of an Act approved December 17, 1894 (Georgia Laws of 1894, pp. 100, 101). As those portions of these acts now in force and material to this case are contained in Code Sections 3306 and 6037, it is not deemed necessary to reprint them herein.

It was held by the Court in *Clarke vs. Graham, 6 Wheaton, 577,* that—"A title to lands can only be acquired or lost according to the laws of the State in which they are situated," and in *Brine vs. Insurance Company, 96 U. S., 627,* that—"The laws of the State in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it. All such laws in existence when a contract in regard to real estate is made, including the contract or mortgage, enter into and become part of such contract."

Under the rule stated in the case last cited the provisions of §3306 and §6037 of the Code of Georgia were a part of the original contract in the security deed given for the loan as if they had been written into it *in haec verbis.*

While the security deed and the remedy provided for its enforcement under the Sections of the Code involved in this case are peculiar to the State of Georgia, (*Shumate, Admr., vs. McLendon, et al 120 Ga., 396)*, the only feature of the law here attacked is the effect of a sale under the suit without making a junior vendee of the land a party to the so called "foreclosure suit," as such failure may affect the right of redemption of the junior vendee.

The conveyance of property under §3306 and §6037 of the Georgia Code to secure a debt conveys the legal estate to the lender and allows the equitable estate to remain in the borrower as an estate upon condition, the condition being that, the borrower will pay the debt according to the terms of the note and the security deed given therefor. After the making of such security deed the borrower holds the equitable estate subject to this condition, which is in the nature of a covenant running with his estate. When he sells to a junior vendee he can not sell any larger estate than is vested in him. Hence, the conveyance of the equitable estate is the conveyance of an estate upon condition.

All such sales are subject to the outstanding loan deed, and in this case was expressly so made. Upon condition broken, that is, upon default of the borrower, or of the person who has assumed payment of the secured debt, a defeasance of the equitable estate vesting the title to the equitable estate back into the original borrower occurs so that, after judgment upon the debt, when a deed is made to the original grantor in the security deed conveying the legal estate to him for the purpose of levy and sale, both the legal estate and the equitable estate are merged in the original grantor in the security deed, against whom judgment has been rendered, so that the levy of the execution issued upon the judgment for the secured debt falls upon both the legal and equitable estate. Upon default in payment by the original maker of the security deed, or by the junior vendee, and upon judgment obtained against the original maker of the security deed, the equitable estate immedaitely reverts

by operation of law in the judgment debtor as an escrow deed for the purpose of levy and sale. The right of tendering the debt and having the property conveyed to him persists until the sale, although the estate held by him has passed from him and lies in escrow for the benefit of the remedy pursued by the judgment creditor under the terms of the security deed.

## NO RIGHT OF REDEMPTION AFTER SALE

In Georgia there is no right of redemption after judicial sale in any case, except in cases of sales for taxes under executions therefor. In Georgia, a mortgagor, even, in an ordinary mortgage can not redeem after a sale has been made under a foreclosure judgment. *Suttles vs. Sewell, 105 Ga., p. 133,* "When a creditor who had taken a deed from his debtor to secure a debt, pursued the Statute, sued his claim to judgment, filed a deed reconveying to his debtor the land in question, had his execution levied thereon and the property was sold at judicial sale to him; after he obtained the sheriff's deed his title, legal and equitable, become complete and indefeasible." *Crawford, et al vs. Pritchard, et al 81 Ga., p. 14.*

In the case of *Bell Mining Company vs. Butte Bank, 156, U. S., 470,* the Court held,—"That the power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not choose to foreclose the mortgage by the ordinary methods provided by law, he can proceed under the power added to the sale of the property, to obtain payment of the indebtedness.

"The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted, and the mortgage is not, as it may be, foreclosed

in the ordinary manner, but when a sale is made of the interest of the mortgagor his right is wholly divested, embracing his equity of redemption."

In the case of *Carrington vs. Citizens Bank of Waynesboro, 144 Ga., page 52,* it was held,—"After the property had been sold at the second sale and purchased by the grantee in the security deed, under permission contained in the deed to become a purchaser at the sale, the bidder at the first sale had no right, on tender of his bid several days thereafter, to demand its acceptance, and a conveyance of the land to him by the purchaser at the second sale, who was the grantee in the security deed.

"A sale under power in a security deed divests the title of the grantor, and he has no legal right several days thereafter, on tender of the amount of the debt secured by the deed to the grantee, who is the purchaser at the sale, to demand a conveyance of the land or a cancellation of the security deed."

"Where a sale of land is made under a power contained in a security deed, and by permission of the grantor contained in the deed the grantee purchases the land at such sale, the grantor can not defeat the purchaser's right to have the sale fully consummated, by tender of the amount of his indebtedness to the grantee before the actual execution of the deed pursuant to the terms of the sale."

The author of Jones on Mortgages (Sixth Edition at p. 6, §1047, states that—"The right of redemption is barred by a foreclosure properly made, except when a further right is given by Statute," upon authority of the following cases, to-wit:

*Weiner vs. Heintz, 17th Ill., 259;*
*Willis vs. McIntosh, Ga., Dec., 162;*
*Stoddard vs. Forbes, 16 Ia., 296;*
*Evans vs. Kahr, 60th Kan., 719;*
*Martin vs. Ward, 60th Ark., 510.*

It will be seen upon the authority of *Suttles vs. Sewell*, supra, that no statutory right of redemption, after judicial sale under a mortgage foreclosure, exists in Georgia.

Then if the right of redemption is to be determined according to the law of Georgia relating to ordinary mortgage foreclosures, such right of redemption does not exist, and if the point is to be determined upon the theory that the security deed was a trust deed with a power of sale, and that the proceeding bringing the property to sale was an exercise of a power, then the right of redemption is destroyed under the law as decided by this Court in the case of *Bell Mining Co. vs. Butte Bank, supra*, and the cases of *Bank of Gutschlick, 14 Peters, 19, 29*, and *Morsel vs. First National Bank, 91 U. S., 357, 361.*

*SECTIONS 3306 AND 6037 OF THE GEORGIA CODE DO NOT DENY TO A JUNIOR VENDEE DUE PROCESS OF LAW, OR DEPRIVE HIM OF EQUAL PROTECTION OF THE LAW, NOTWITHSTANDING THEIR FAILURE TO MAKE HIM A PARTY TO A FORECLOSURE SALE.*

Although a junior vendee is not a necessary party to a foreclosure under the Sections above named this does not deprive him of due process of law, because the judgment is not conclusive against him and he can assert any rights which he may have in the Courts of Georgia.

"The statutory foreclosure of a mortgage on realty does not contemplate that a third person may defend, and a junior encumbrancer or subsequent purchaser is not a necessary party to a foreclosure suit."

*Roberts vs. Atl. Cemetery Ass'n., 146 Ga., 490, 496;*

*Brooks vs. Lowry Natl. Bank, 141 Ga., 493.*

But "the foreclosure of the mortgage to which the subsequent purchaser is not a party, does not affect the right of such purchaser."

*Howard vs. Gresham, 27 Ga., 347;*

*Williams vs. Terrell, 54 Ga., 462;*

*Osborne vs. Rice, 107 Ga., 281, 285;*

*Swift vs. Deerick, 106 Ga., 35;*

*Hinesley vs. Stewart, 139 Ga., 7.*

The rule of law obtaining in Georgia in such cases is thus stated in the case of *Osborne vs. Rice*, supra, "A purchaser prior to statutory foreclosure who is not a party, is not bound by the judgment, and may when the Fi Fa is levied go behind the judgment and set up that the mortgage could not be legally enforced against him." The rule applied by the Courts of Georgia is in exact accord with the rule applied by the Supreme Court of the United States. *Howard vs. Railway Co., 101 U. S., 837; Brewster vs. Wakefield, 22 Howard, 118, 129.*

While the judgment rendered in a case of a "foreclosure" at which proceeding a junior vendee of the land is not a party is not conclusive on such vendee, it is valid as between the holder of the mortgage and the mortgagor, and a purchaser at the foreclosure sale acquires the legal estate of the mortgagor, and where no illegality exists in the foreclosure proceedings, the sheriff's deed is superior to the deed executed by the mortgagor after the date of the mortgage.

*Roberts vs. Atlanta Cemetery Assn., et al, 146 Ga., 490, 496.*

While the foreclosure of the mortgage in which a subsequent purchaser is not a party does not affect the right of such purchaser, his remedy is not the right to redeem after

the sale by tender of the debt secured by the mortgage or security deed in the absence of some valid attack upon the judgment of foreclosure in which some illegality must be shown in the proceedings by which the judgment of foreclosure was rendered. In other words, the person attacking the judgment must set up some reason which he could have urged at the trial under which the judgment was rendered legally sufficient to have prevented the rendition of such judgment if he had been a party to the proceedings.

If such legally defensive facts existed and he was not a party to the foreclosure proceedings, he can, upon the tender of the mortgage debt and the filing of a bill to cancel the mortgage, or in the case of an attempted eviction under the Sheriff's deed, if he was in possession, or in support of an action to recover the land, or in any other proceeding affecting his interest in the land, show that the mortgage was barred by the Statutes of Limitation at the time of the foreclosure suit was filed, (*Williams & Company vs. Terrell, 54 Ga., 462*), or he may go behind the judgment rendered in favor of the plaintiff and show that the debt for the purchase price had been discharged before the suit was begun (*Washington Exchange Bank vs. Holland, 121 Ga., 305-7*), or he may show that the original mortgage or security deed was void for uncertainty (*Osborne vs. Rice, 107 Ga., p. 281*).

It will be seen from these citations that while the law of Georgia cuts off the equity of redemption as relating to a junior purchaser of property transferred by security deed, it preserves all of his rights to show that the judgment of foreclosure was not valid, but before redeeming, he must attack the judgment and show it to have been invalid.

A junior vendee under a security deed who was not a party to the foreclosure proceedings, desiring to set up rights under his junior conveyance as against the judgment rendered in the foreclosure suit, is in the position of a party attempting to open a default, and who must set up, in his

motion, matters which would have been good if they had been pleaded before judgment was rendered, and tender payment of the secured debt. *Stanbach vs. Thornton, 106 Ga., 81, 83; Palmer vs. Young, 96 Ga., 246; Mutual Loan Co. vs. Haas, 100 Ga., 111.*

The contention of the plaintiff in error narrows itself down to the proposition that although she had no defense to the foreclosure which she could have pleaded had she been a party to the foreclosure proceeding, and has none now if the case were reopened and she were made a party, still her right of redemption persists for the mere naked reason that she has never been a party to any judicial proceeding of foreclosure. This position is untenable—(a) Because, there was no privity of contract between her and the holder of the security deed; (b) Because, she bought subject to a contract which provided a method of foreclosure without making a junior vendee a party; (c) Because, under the loan deed and under her purchase of the property subject thereto, the burden was upon her to prevent default and keep informed as to any proceeding to foreclose, which she could neglect to do only at her peril; (d) Because, the Statutory method of foreclosure provided that before the property could be levied upon for the satisfaction of the loan, the holder of the security deed was required to file in the office of the Clerk of the Superior Court,—the Registrar of Deeds under the law of Georgia,—a quitclaim deed for levy and sale, the record of which was constructive notice to junior vendees and to all the world of the seizure of the legal and equitable title for a sale to be had which would bar the right of redemption.

While the purchaser of what plaintiff in error denominates the equity in redemption is not technically bound by the suit, judgment and proceedings to sell because he was not a party, he bought knowing that the law did not require, or make provisions for his being made a party, (Georgia Code §6037); that the method of foreclosure was within the competency of the State of Georgia to enact; that

the Section of the Code under which the security deed was made expressly provided a method of foreclosure only by a suit against the original mortgagor, and in his present suit he sets up no facts which he could have pleaded in defense of a foreclosure if he had been a party.

A junior vendee having bought after the execution of a security deed under Georgia Code, §3306 and subject to it, and to the remedy provided in §6037, is in the position of a person who has acquired an interest in a mortgagee's property after the commencement of suit to foreclose and is represented by mortgagor. *Hollins vs. Brierfield Coal & Iron Co., 150 U. S. 371, 286;*

Whether the junior vendee is bound by the judgment or not, he can not redeem without showing that the Statute was not observed in the proceeding to sell and merely because he was not a party. His case is exactly like that of a purchaser of land from one against whom there is an ordinary common law judgment. Such purchaser would not be bound or estopped by the judgment, but if he could not show a failure to comply with the law in the obtaining of the judgment, the sheriff's sale under the judgment, would pass a good title to the purchaser at the sheriff's sale and the Sheriff's Deed would be superior to the deed of the purchaser of the land who purchased it subject to the outstanding common law judgment.

The whole argument on this branch of the case resolves itself to the simple proposition that a proceeding between A and B cannot be a denial of due process of law as to C when the judgment in the proceeding does not conclude the rights of C and where the Courts are open to C to have his rights adjudicated whenever it may be necessary to the assertion or preservation of his right.

## ARGUMENT AND AUTHORITIES IN REPLY TO BRIEF FOR PLAINTIFF IN ERROR

*The Remedy provided under §6037 of the Georgia Code Is a Substantive Right Under a Deed Given under the Georgia Statute.*

The general rule that the right to a particular remedy is not a vested right is subject to the exception of those cases in which the remedy is part of the right itself.

This exception is the controlling principle upon which State laws so affecting the remedy which existed when a contract was made, which by a change of the remedy contracted for, impair or lessen the value of the contract, are held to be void as laws impairing the obligations of the contract. *Planters Bank vs. Sharp, 6 How. 301; Seibert vs. Lewis, 122 U. S., 284.* The obligation of a contract is impaired whenever legislation lessens the efficiency of the means which, at the time of making a contract, the law provided for its enforcement as by postponing or retarding such enforcement. *Louisiana ex rel. Ranger vs. New Orleans, 102 U. S., 203; Louisiana vs. Pittsburg, 105 U. S., 301; Louisiana vs. Jumel, 107 U. S., 750.* As a State can not enact a law acting directly upon the terms of a contract, so it can not pass a law professing only to regulate the remedy when in fact it impairs the obligation of the contract. *Grantly vs. Ewing, 3 How., 707.*

If a State Statute impairs a means provided by law for the enforcement of a contract, at the time of its making, it is unconstitutional and void. *Louisiana ex rel. Nelso vs. St. Martin's Parish, 111 U. S.,* 716. The remedy provided by a State law when the contract is executed can not be impaired by subsequent decisions of Courts any more than by subsequent Statutes. *United States ex rel. Butz vs. Muscatine, Wallace, 575.*

It follows necessarily that if a remedy is so much a part of the contract as that neither the legislative power by subsequent enactments, nor the judicial power by construction, can affect the remedy without impairing the obligation of the contract that such a remedy is a substantive part of the contract. The remedy provided for the holder of a debt secured by a security deed under the Georgia Statute in question is such a substantive portion of the original contract of security.

In *Pritchard vs. Norton, 106 U. S., on page 132, this Court held that* "The principal that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our Constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a State of any law impairing the obligation of contracts. For it has been uniformly held that "any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." *Citing: McCracken vs. Howard, 2nd, Howard, 608, 612.*

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against interference. Whether it springs from contract or from the principles of common law, it is not competent for the legislature to take it away."

A familiar example of such void laws are laws either extending or shortening the time for the redemption of lands sold under executions or mortgage foreclosures.

*Barnitz vs. Beverly, 163 U. S., 118.*

In the case of *Mutual Loan & Bonding Company vs. Haas, et al,* 100 *Ga., p.* 111, *it was* held that—"Where a debtor executed to a creditor a mortgage upon realty to secure a debt and therein gave to the creditor a power of sale to be exercised on default of payment, the sale to be had at public outcry before the Court House door, and after advertisement, such power became a part of the security, and being conferred for the purpose of effectuating the same, was not revocable, either by the mortgagor or by the rendition of a judgment against him in favor of another creditor. Where on default of payment the mortgagee exercised the power by selling the land this was equivalent to a sale under foreclosure of the mortgage by a court of competent jurisdiction, and a bona fide purchaser at the sale obtained title

free from the lien of judgments junior to the mortgage though rendered before the exercise of the power."

No better example of a vested substantial right created by contract can be imagined than the right contracted for in the case that upon default of the borrower the lender shall find the entire estate, legal and equitable, in the hands of the original borrower capable of being subjected to the satisfaction of the debt and sold under the power given under §*6037* of the Georgia Code without subjecting the borrower to the additional expense of searching for junior vendees to whom the property may have been transferred without notice to him, possibly on the very eve of foreclosure, and who may be beyond the jurisdiction of the Court having venue to entertain a suit against the borrower, which junior vendees may in turn have transferred to others, and thus set the lender upon an interminable, and perhaps impossible, pursuit of elusive vendees.

## THE TERM "EQUITY OF REDEMPTION" A MISNOMER APPLIED TO A SECURITY DEED GIVEN UNDER THE GEORGIA STATUTES

The term "Equity of Redemption" arose out of the practice of the Courts of Equity under the common law where the law allowed no right of redemption and equity created a right of redemption. The right being one created by equity, it was properly denominated an "equity" of redemption and for the existence and nature of the rights the practice of the Courts of equity are to be looked to. In the case of a security deed made under the Georgia Statutes, the right to redeem is not an equitable right of redemption, but is a "legal right of redemption," and, in determining the existence nature and extent of the right the creative statute alone is to be looked to. Hence, the decisions cited by counsel for plaintiff in error in his brief on the subject of the "equity of redemption" are of little relevancy.

## PRIORITY OF JUDGMENT ON SECURED DEBT OVER A TRANSFER OF SO CALLED EQUITY OF REDEMPTION

Upon the rendition of a judgment upon a debt secured by a security deed such judgment is a general, that is a personal judgment, against the defendant from the date of its rendition, and upon the filing of a reconveyance for levy and sale such judgment becomes a special lien upon the land conveyed as security and takes precedence of an older judgment rendered after the conveyance to secure the debt was made.

*McAlpin vs. Bailey, 76 Ga., 687,*

*Henry vs. McAllister, 93 Ga., 667,*

*Maddox vs. Arthur, 122 Ga., 671.*

It is in accordance with long established legal principles that a judgment may take effect as of a date prior to its actual rendition. At common law, all judgments rendered at a term of court took effect as of the first day of the term and any one who purchased from the defendant in execution after the term of court opened, but before the judgment was rendered, took subject to the lien of the judgment. The Georgia Statute has simply adopted this common law principle and has provided that a judgment on a note secured by a loan deed shall take effect, not from the date of its rendition, but from the date the loan deed was recorded. This principle of law protects every one who may undertake to deal with the borrower after the loan deed has been recorded. The record puts him on express notice that should judgment be rendered it will date back to the date of the recording of the security conveyance. Such a judgment is in no sense a lien against the transferee of the so called equity of redemption. It does not bind any of his rights but it does bind the property of the original borrower as of the date the loan deed was recorded. This right of hav-

ing the lien of his judgment date back is an essential part of the lender's security in the same way that a power of sale is a part of the security.

It is not the judgment that divests the statutory right of redemption, that right is not extinguished until the sale is actually consummated and it is extinguished not by the judgment, but by the sale. A sale upon a judgment of this character necessarily cuts out the right of redemption of a junior vendee. Until default in the security debt and until the holder of the security debt has obtained his judgment, and thus obtained a special lien dating back to the date of the record of his security deed he holds the title pledged to him as security immune from judgments rendered against the debtor after the execution of his security deed and against vendees of the borrower acquiring title to the equitable estate after the record of the security deed. After the holder of the security deed has had his special lien so dating back to the record of his security deed, established as a judgment of the court he can then safely transfer the legal title to the maker of the security deed for the purpose of levy and sale, because his prior special lien judgment is superior to intervening judgments or transfers of the title, and when the sale is made it destroys all rights under judgments or transfers made after the record of the security deed in the same way a sale under an older common law judgment destroys the lien of subsequent judgments or transfers.

Even after the sale the right of a junior vendee is not necessarily extinguished because if the property at the sale brings more than the amount of the judgment under which the sale is made, the excess is payable to such junior vendee. In other words, the Statute does not undertake to divest the rights of the junior vendee, but merely to transfer him to the fund produced by the Sheriff's sale. The prior lien on the fund being in the holder of the judgment under the security deed, and if any excess remains the same

is applicable to junior judgments or junior vendees. The principle involved is that of a sale under a senior lien divesting a junior lien or transfer.

## CONCLUSION

The method of conveying property as security for a debt, provided in §*3306* of the Code has been the settled public policy of Georgia for more than fifty years. The method of foreclosure has existed for more than a generation. It constitutes a basic law concerning the tenure and alienation of lands in the State of Georgia, which the State had a right to adopt, and for the protection of junior vendees and all other persons interested in lands conveyed and sold under these Sections of the Code the practice in Georgia gives ample opportunity to every person having a right in such lands to have his right adjudicated in the Courts of Georgia. There is, therefore, no denial of due process of law, or any failure to afford an equal protection of the laws.

Respectfully submitted,

WALTER McELREATH,

Attorney for Defendants in Error.

# SUPREME COURT OF THE UNITED STATES.

No. 253.—October Term, 1925.

Dorothy Scott, Plaintiff in Error,
*vs.*
J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett, et al.

In Error to the Supreme Court of the State of Georgia.

[June 7, 1926.]

Mr. Justice Sanford delivered the opinion of the Court.

This case involves a single question relating to the constitutional validity of § 6037 of the Georgia Code of 1910. This section, which is set forth in the margin,[1] provides, in substance, that in cases where a deed has been executed conveying the legal title to land as security for the payment of a debt[2]—known in Georgia as a "security deed"—and the holder of the debt, upon default in payment, has reduced it to judgment, and the holder of the legal title to the land makes and places of record a quitclaim conveyance to the debtor, reinvesting him with the legal title to the land, it may thereupon be levied upon and sold in satisfaction of the judgment.

This suit was brought by Dorothy Scott in a Superior Court of Georgia. The case made by her petition was, in substance, this: In 1919 she purchased a tract of land, subject to a security deed which the previous owner had executed to secure a note for borrowed money. Thereafter, the note not being paid at maturity,

[1] "§ 6037. In cases where . . . a deed to secure a debt has been executed, and the . . . secured debt has been reduced to judgment by the . . . holder of said debt, the holder of the legal title . . . shall, without order of any court, make and execute to said defendant in fi.fa . . . a quitclaim conveyance to such . . . property, and file and have the same recorded in the clerk's office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment. . . ."

[2] See § 3306.

the holder, the grantee in the security deed, brought suit, without notice to her, against the grantor in the security deed, and after recovering judgment on the note, executed and placed of record a quitclaim deed to the defendant; whereupon the sheriff levied an execution on the land, and, after due advertisement, sold it at public sale in satisfaction of the judgment. The petitioner, while not claiming that there was any defense to the note or any irregularity or *mala fides* in the proceeding, alleged that the sale was void as against her on the ground that § 6037 of the Code, as applied to a case where the grantor in a security deed conveys his interest in the land to a third person before a suit is brought to reduce the secured debt to judgment, is in conflict with the due process and equal protection clauses of the Fourteenth Amendment, in that it provides that the person thus acquiring the interest of the grantor, may be divested thereof through a proceeding to which he is not a party, without notice or opportunity to be heard and make defense. The petitioner prayed that the sale be held null and void as against her, and that she be declared the equitable owner of the land, with the right to redeem the legal title by payment of the note.

The petition was dismissed by the Superior Court, on demurrer; and this judgment was affirmed by the Supreme Court of the State, *per curiam*. 158 Ga. 876. The case is here on a writ of error under § 237 of the Judicial Code.

The case is in a narrow compass. That, under the Georgia decisions, a sale made under a prior security deed in conformity to the provisions of § 6307, divests a purchaser from the grantor of all rights in the land is conceded. The contention that this section is unconstitutional, as applied to such a purchaser, rests, in its last analysis, upon the claim that he is entitled, as a matter of right, in accordance with settled usage and established principles of law, to notice of a proceeding to sell the land under the prior security deed and opportunity to make defense therein. We cannot sustain this contention.

Here the holder of the secured debt was also the holder of the legal title to the property by which it was secured. In such case at least, § 6037 authorizes the holder of the secured debt, by following the procedure outlined by the statute, to bring the property to sale in satisfaction of the debt. Its effect is no more than if it

conferred upon the holder of the secured debt a statutory power of sale, which may be treated as equivalent, in so far as the constitutional question is concerned, to an express power of sale in a mortgage or trust deed.

Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale. The validity of such a contractual power of sale is unquestionable. In *Bell Mining Co.* v. *Butte Bank*, 156 U. S. 470, 477, this court said: "There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance." In the absence of a specific provision to that effect, the holder of a mortgage or trust deed with power of sale, is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. *McIver* v. *Smith*, 118 N. C. 73, 75; *Atkinson* v. *College*, 54 W. Va. 32, 49; *Grove* v. *Loan Co.*, 17 N. Dak. 352, 358; *Hardwicke* v. *Hamilton*, 121 Mo. 465, 473; *Ostrander* v. *Hart*, (N. Y.) 30 N. E. 504. And see *Watkins* v. *Booth*, 55 Colo. 91, 94; and *Groff* v. *Morehouse*, 51 N. Y. 503, 505. In *Hardwicke* v. *Hamilton, supra*, 473, the court said that "the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar subsequent or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed or trust. All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith." And in *Watkins* v. *Booth, supra*, 94, the court said that it was the duty of the subsequent lienor "to keep advised as to proceedings in case of the former trust deed."

So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the

holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And § 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws.

The judgment is

*Affirmed.*

A true copy.

Test

*Clerk, Supreme Court, U. S.*